THE CANON LAW IN MEDIAEVAL ENGLAND

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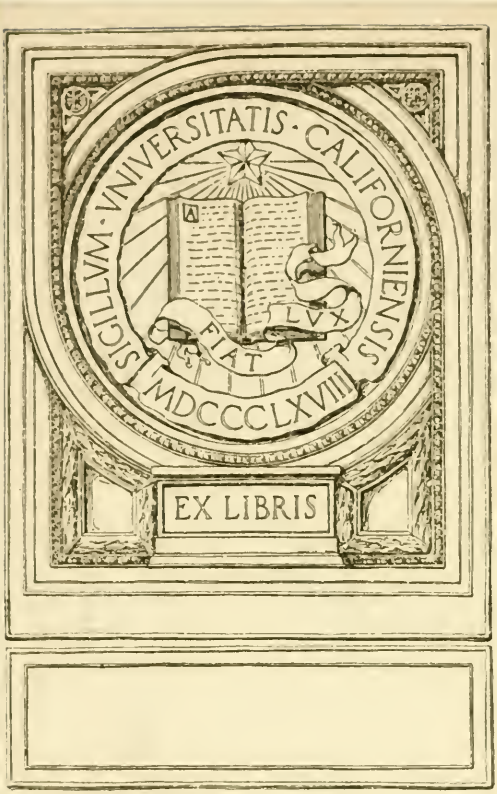
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THE CANON LAW IN MEDIÆVAL ENGLAND

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AN EXAMINATION OF WILLIAM LYNDWOOD'S "PROVINCIALE," IN REPLY TO THE LATE PROFESSOR F. W. MAITLAND

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1912

TO

MY OLD COLLEAGUES

OF THE CHURCH OF WALES

WITH MANY HAPPY AND INSPIRING

RECOLLECTIONS OF TEN YEARS' WORK

AMONG THEM

PREFACE

It is a mere accident that the historical inquiry with which these pages are concerned has any bearing upon current politics. Its results were reached without any thought that a sudden turn of political controversy might make it expedient to produce them, in however imperfect a form. Only in October last did it become clear, from an important manifesto of Mr. Ellis J. Griffith, K.C., M.P., that the case for the impending "Disendowment" of the Welsh Church was to be based on Professor Maitland's treatise on the Canon Law. Without loss of time I thereupon endeavoured to set down the reasons which had led me to rank Maitland's thesis among the many which, in so far as they are true, are not new, and, in so far as they are new, are not true. I was urged to do so by a very real concern for the cause with which Maitland's name and authority had suddenly become involved. I have had an opportunity, such as can have been given to but few Englishmen, of observing, for a lengthened period and at very close

quarters, the religious life of Wales, and that from the standpoint of one whose sympathies are wholly on the side of Liberalism. That experience has left me in no doubt as to where in this matter, momentous out of all proportion to the material interests involved, the line of duty lies.

While this book has been in preparation, there has also been in preparation a temperate and reasoned statement of the case for Disestablishment by the Secretary of the Liberation Society, Mr. David Caird. It may be heartily commended to the consideration of Churchmen who are anxious, on this question, so to run not as uncertainly, so to fight not as combatants who are beating the air. Nothing is more remarkable in it than the frankness with which the author faces the moral issue involved in Disendowment. That there is a moral issue to be faced he fully admits. "The only property for which provision has to be made is the property which originated by way of endowments prior to 1662; and, as has been said, when moral issues are raised, it is essential to ask whether those for whose benefit this mediæval property has been appropriated have a moral title to its use. Upon the answer to that question depends, in part at least, the answer to the question whether the State has a moral right to disendow as well as disestablish

the Church which it now favours and controls." [1] In the words that follow, Mr. Caird sums up, with admirable fairness, the argument for the defence. "If it can be shown that the Church as a spiritual body has had a continuous existence from the time of Augustine; that the four Welsh dioceses are its most ancient dioceses; and that it has not only taught substantially the same doctrine, but maintained the same relation to the State throughout that long period; it has a right to retain the endowments which originated in mediæval times that cannot be successfully challenged on the ground either of law or of ethics." [2] How does Mr. Caird deal with this argument? He deals with it, like Mr. Ellis Griffith, wholly and solely by an appeal to Maitland. If Maitland's position can be met, it will follow that, by the admission of this weightiest apologist of "Liberationism," the plea of justice, by which the Church claims, whether established or unestablished, to retain her ancient means of carrying on her work, will not have been met.

To Liberal Churchmen who view this matter as one of conscience and who have no particular knowledge of Wales, it presents no little embarrassment. I offer them my own impressions for whatever they may be worth,

[1] *Church and State in Wales*, p. 86. [2] *Ibid.*

only saying that in forming them I have had no conscious desire except to see both Church and State upon the side of justice.

In the first place, the relation between the Welsh case to-day and the Irish case of 1869 is one, not of likeness, but of great and glaring contrast. The position of the Welsh Church is altogether better; the treatment to be accorded to her is altogether worse. And this is putting it very mildly.

Then again, there is the feeling of the Welsh people, which, as everybody knows, has been undergoing, of late years, a remarkable and rapid change. To the question whether, in any single Welsh parish, there is a majority in favour of a measure which would mean, even by possibility, the sale of the rectory by auction, the disappearance of the resident parson, and the appropriation of the parochial tithe to the uses of the County Council, I believe that there is only one answer, and that it is not the answer which is given in Parliament. What the voice of the Welsh members in Parliament may mean is an important question. Liberals should insist upon knowing how it is that a "national demand" which is supported in Parliament by seven-eighths of the Welsh members is mentioned explicitly by no more than a quarter of them in their election addresses in Wales itself. Do they

represent a demand of the Welsh people, or only of a resolute and well-organised caucus, bent upon using the present-day Radicalism of Wales for ends which excite, among the people themselves, no vestige of the old enthusiasm? "It is said," a Welsh layman observed to me a little while ago, "that after forty years of agitation this question is ripe for settlement. My own view is that if it was ever ripe for settlement on the lines of Disestablishment and Disendowment, it was forty years ago, and not to-day." That I believe to be the truth. And the truth of Welsh feeling on the matter I believe to be contained in the declaration of one of the Nonconformist witnesses before the Royal Commission: that he would regard it as a calamity to the whole of religion if any one of the religious bodies of Wales were crippled in its resources.

The above are elements in a situation, about which opinions may well differ. There are, besides, certain facts of principle, about which there is less room for difference. There is the governing fact of Welsh nationality, which it is folly, and on the part of Churchmen most tactless folly, to ignore. Incalculable mischief is constantly done through the adoption, by would-be Church 'defenders,' of such a phrase as 'the Church of England in Wales': a phrase

which, though admissible enough in certain connections, is both untactful and untruthful in this. No Church in Christendom can show a better claim to the cognomen of nationality than that of Wales; and it is a claim of which Englishmen, whose place in Christendom has been greatly determined by their attitude towards nationality, can least afford to make light.

Again, there are undoubted facts in Welsh Church history, some splendid, some squalid, which give colour to the demand that Disestablishment, taken by itself, should be considered as a Welsh and not an English question, and dealt with in its bearing on the peculiar religious life of Wales. But here it is that the difficulty comes in. Disestablishment cannot be taken by itself. It is implicated in a demand for "Disendowment" on a scale and under conditions which involve dislocation and destitution such as no reasonable degree of self-sacrifice can meet. Without such Disendowment, we are plainly told, Disestablishment is not worth asking for or having. It is at this point that the question ceases to be a political question or a Welsh question, and becomes a moral question of the first magnitude in which England is involved inevitably. How stand the facts? The ancient endowments of the Church are the most sacred form

of trust property, national in the sense in which all trust property is national, and entitled, accordingly, while the trusts are valid and their obligations are discharged, to the jealous protection of the law. Solemnly, repeatedly, consistently, for three hundred years and more, Parliament has declared these trusts to be valid as well in morals as in law. That the obligations of service which attach to them are being discharged to-day with exemplary faithfulness and devotion, is not denied on any hand. What ground is there then for the exceptional treatment, by special legislation, of this sacred form of trust property, on the assurance of which there has been built up, as an obligation extending to every corner of the country, a vast and exacting ministry of souls? The acknowledged spokesmen of 'Liberationism,' in the House of Commons and outside it, have frankly explained to us their ground. The ground they take is nothing else than this: that Parliament, in holding these trusts to be morally valid, has all along been wrong; that Roman Catholic controversialists, in holding the contrary, have all along been right; and the arbiter on this momentous issue is one brilliant intellectual free-lance, a professed 'dissenter' from all Churches, who formed, in the course of other studies, a passing acquaintance with the

mediæval Canon Law and wrote a trenchant and stimulating little book about it. The whole case stands or falls with Maitland.

Now Maitland was a convinced agnostic, and his conclusions upon a point of history had for him no bearing upon the question of any Christian profession. But the Nonconformists of Wales are not in that case. They are Christian men, involved in a Church connection of some sort. Their acceptance of Maitland cannot be academic ; it must bind them in the court of conscience. The position to which it commits them is that of the repudiation of Protestantism. Can they hope to derive, from this project of "Disendowment," any advantage commensurable with the price ?

If my word had any weight with the Welsh people—and I believe I love them as well as any of their leaders—it would be to urge them to hold their hands in this business. They seem to me a little too light-hearted about an enterprise which means, after all, cutting the life-thread of History and turning the Old Mother out of doors. For a nation which lives so largely upon its memories, that is surely no light thing. With patience and charity this problem can be solved on lines which will make for the strength and unity of the common household of faith. But unless a swift and blessed change comes over the situa-

tion as we see it, I can discern few of the conditions of a worthy solution in the political circumstances of the year 1912. The Welsh people, I know, will strive to do right. This is only a humble appeal to faith, but I believe it comes to them from the heart of history.

A. O.

Festival of the Epiphany,
1912.

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I. THE CHURCH OF ENGLAND IN HISTORY

The cataclysms of history are like those of nature. Deep, subterranean energies assert themselves in sudden and violent movement. The outward crust of things is broken up; old landmarks are engulfed; vast, savage agglomerations of event pile themselves up before men's vision, blocking out portions of their horizon, towering, terrific; they hold the gaze of successive generations advancing ever within view of them, and ever viewing them from newer standpoints as the human march proceeds. To no two generations will they present themselves the same; every view of them, for its own age, will be inevitable and true; the most commanding view of them will still be partial; but one view may differ greatly from another in its approximation to com-

pleteness. To one generation, probably that nearest to them, they will appear a featureless and frowning mass, close, and vivid with many lightnings; to another more distant and at something of an altitude, they may present themselves in more and more of grandeur, range, variety, even beauty.

The Reformation was one, and among the greatest, of these cataclysms of history. What did it mean? What did it mean in the shape which it assumed in England? How were men to regard the Church of England, the old Ecclesia Anglicana, whose every feature was more or less remoulded by it?

Roughly, there have been, since the Reformation, three dominant conceptions under which, successively, Englishmen have been in the habit of regarding their Church. Stress is laid on the word dominant; for each one of the three, so far from excluding, presumed, while for the time it overshadowed, the rest. The first conception was that of the Church of England as Protestant. It defined the position of the Church in conflict with Rome and the political forces in alliance with Rome. It prevailed throughout the period beginning with the adventures of Drake and ending with the campaigns of Marlborough: a period during which, with little intermission, English standards of civil and religious liberty were

fighting for dear life, and always with the same unresting adversary. The last belated rumbling of that stormy era is heard upon the field of Culloden; but the period ended, and the menace ceased, with the accession of the House of Hanover.

From that time another, and poorer, conception becomes dominant. We may call it the "establishmentarian" conception, the ruling notion of the Church as "Established." It is characteristic of the eighteenth century. Its hall-mark is the phrase, "the Church of England by law established," an expression which, though occurring in the Canons of 1604, had little popular currency until after the Revolution. It defined the position of the Church as against the growing forces of Dissent, now recognised and regularised by the Toleration Acts; it expressed the high and dry contentment with things as they were and as the law declared them, the hunger for quietude after generations of strain, the nervous distrust and dread of "enthusiasm" and all that might stir the deep places of the soul. Hard things have been written of the eighteenth century; but we do not begin to understand it until we observe the mind of a man like Bishop Butler in contact with the formative movements of his age. The Church, after two centuries of storm and stress, was under-

going, half consciously, a sort of spiritual rest-cure; and its mind found shelter in the idea of the Establishment as a kind of legal sanatorium, the bounds of which, for the time at any rate, were all-sufficing. It was not a phase in which the Christian spirit could long dwell, and Methodism was a prompt revolt against it.

The time of convalescence was marked by the Evangelical revival. A great movement of spiritual religion, it prepared the way for an even greater movement in which personal devotion was consecrated to the service of principles and ideals avowedly ecclesiastical. The personal quest of salvation became merged in solicitude for the Church as the ark of salvation. It all came about through external pressure. Vast changes had taken place within the Constitution. In the face of them the Tudor settlement of religion was proving itself no settlement at all; but only, like the mediæval Papacy itself, one of the great makeshifts of history. It had presumed the fact of personal sovereignty, and personal sovereignty of the Tudor mould: a sovereignty which, devolving successively to Scotsman, Dutchman, German, had, in the early decades of the nineteenth century, simply ceased to be. The Church found herself face to face with a new, composite, heterogeneous Sovereign; its effec-

tive organ was a House of Commons whose very sympathies contained the menace of Erastianism. For the third time she had to define her position, no longer as against Rome, no longer as against Dissent and "enthusiasm," but as against this new and formidable Defender of her Faith. The result was the Oxford Movement, in which the Church, going beyond the Tudors and behind the Popes, appealed to her original charter as part and parcel of the Holy Catholic Church of her creeds.

No view could be more insufficient than that which regards the Oxford Movement as an attempt to "undo the Reformation"; in reality, it affirmed the principles of the Reformation with a learning, freedom, and confidence before unknown. The effect of papal influence and authority had been to reduce the Church to a state of invalidism. The Tudors snapped the papal crutches, and provided the Church with crutches of their own; but they were made of very brittle timber, and were soon sprung and splintered in use. Tractarianism was simply the first great effort of Anglicanism to move without its crutches. Its summons to Churchmen was that of Peter to the cripple at the Temple gate: "In the name of Jesus Christ of Nazareth, walk." It involved no renouncement of Protestantism, but only of the old crude weapons of Protest-

ant warfare; it involved no breach with those honourable relations with the civil order which had been coeval with the Church's history. These things remained; but as secondary to the preservation of a Catholic faith and Catholic discipline the integrity of which she would sell for no price. The dominant conception of their Church as Catholic begins rapidly to possess the minds of Englishmen.

This Catholic conception, while rejecting Papistry,[1] transcended Protestantism; it was a positive conception, a spirit and an ideal, no mere corpus of definitions; its aim and genius was that of recovery, the recovery of a grace and power which antiquity had possessed, which Papalism had perverted, and which Protestantism, in its revulsion from Papistry, had been content almost to renounce. This new Catholicism, spirit and ideal, was simply the measure of the stature of the fullness of Christ as manifested, and to be manifested, in His Body the Church. Into the measure of that stature Anglicanism must strive to grow, though Acts of Uniformity may be fractured in the process. On lines of retrogression no growth could come; Papalism was impossible; and at the same time

[1] The words Papist and Papistry are here used throughout in no invidious sense, but as the only precise expression of the principle that obedience to the Pope is "articulus stantis vel cadentis ecclesiæ."

Tudorism had been clearly a tower of refuge, clearly not a continuing city. "If any of you lack wisdom, let him ask of God, that giveth to all men liberally." That was the spirit which made Oxford a holy place. The Oxford leaders had genius, holiness, and learning; but, in the face of so great a thing, they lacked wisdom; and they fell, accordingly, to asking God. They asked God in prayer; they asked God in labour; not least, they asked God in history. Building for the future, they sought devoutly to build upon the past. They assumed the unity, and the divine worth, of all Christian history. They gloried in their connections with the past; they declined to repudiate even the stained and chequered past, for the overruling hand of God had been upon it. They viewed the Reformation, the English Reformation, from the standpoint of its own authors, as a return to, not a revolt from, true Catholicism. Implicit in their movement was the appeal to history. It gave rise to a great new school of historical investigation. In the work of this school the history of England, both in Church and State, was presented as a continuous tradition. The exclusion of the papal authority in the sixteenth century was seen as the extension and completion of measures of restraint which, in one form or another and with more or less

consistency, had been applied throughout the Middle Ages. The English Church, throughout her history, was conceived as national: a character which her inclusion, for some centuries, within the papal system, had obscured and defaced, but never obliterated. Her people, both clergy and laity, were subjects of the Pope *de jure*, but they were also, both *de facto* and *de jure*, subjects of the Crown; and the grosser papal assaults upon her nationality they had repelled deliberately through the agency of the Crown. Their Church they had never known but as the English Church, Ecclesia Anglicana. The Roman Church, the Church, that is, of the city and diocese of Rome, they reverenced as the great prerogative See of Christendom; its august occupant, the imagined successor of St. Peter and holder of the awful keys, they acknowledged, with feelings varying between devotion and disgust, as their Holy Father the Pope; the jurisdiction of the Roman Court, through which his authority over them was exercised, they admitted with more or less of cheerfulness and patience. As to themselves "belonging to the Roman Catholic Church," as the saying is, such a phrase would have had no meaning to them; as applied to the Middle Ages, it is merely a weird anachronism, the backward reflection of later and more lurid

history. As members of the English Church they had their own origins, their own revenues, their own hierarchy, their own rituals, their own legislatures, laws and law-courts, all distinctive in a greater or less degree. This does not mean that they were not in closest relations with the other Churches of the West, or in acknowledged allegiance to the Papacy; it does mean that, with all this, they had, as Churchmen, a clear and conscious national identity, and many monuments of it to cherish and defend. Henry VIII. did not create the sentiment of nationalism to which he made his fateful appeal. It had always been a living force, and had found abundant expression in law and history. When Henry struck at the papal jurisdiction and forbade recourse to it, he needed to invoke no new terrors; he merely extended the scope of penalties which devoted Catholic ages had bequeathed. He had simply to apply to the whole field of jurisdiction the restrictive and sternly penal statutes which had long controlled a part of it. When the crisis came, the papal authority was found hanging by little but the purse-strings. The determinative measures which put an end to it, and which, in England, constituted the Reformation, were simply a sheaf of statutes enacting that in future neither suits nor subsidies

should find their way to Rome. They carried England into the current of change; and the English Bible, the English Prayer Book, the English formularies, the independent and full-panoplied Church of England ensued as the inevitable corollary; but the one great issue of principle was decided when the Roman Court and the Roman Pontiff were excluded absolutely. Men devoted to the papal dogma might say then, as they may say now, that this absolute exclusion, as distinct from the former partial limitation, was of such a nature as to annul the catholic character of the Church, and to leave it thenceforward a mere schismatic Protestant body, enjoying, by arbitrary gift of Parliament, the ancient endowments of Catholic times. That is the proper papist argument, founded upon the proper papist principle; and the man who holds it, then or now, is properly a Papist and nothing else. He may be very unconscious of the fact. He may sit in Parliament for a Welsh constituency, and call himself a Methodist or a Particular Baptist; he may have no more sinister aim than that of stimulating the energies of the Welsh Church by beggaring her parishes; but if he wants to do so on these principles, he is, whatever his aim or designation, a Papist pure and simple. In advocating Disendowment on these prin-

ciples he must commend them to a Parliament which, except in the brief reign of Mary, has always rejected them with uncompromising vigour. It is one of the finer ironies of history that he is looking for support to the representatives of papist Ireland. The fact, to many so surprising and even unnatural, is of course entirely true to nature. Adopting papist principles, he can have no compunction in accepting papist allies. What it all means is that it is a great deal easier to extract pledges and engineer majorities than to circumvent the logic of history. The logic of history has so arranged it that no Protestant can strike at the Church of England without strengthening the Church of Rome and moulding his lips to the Roman shibboleth. If he wants to do so, well and good—or bad; but at least let him do so with his eyes open.

The reader may imagine that we are wandering from the point; but it is not so. This is, just now, the point. It needs to be made clear; for it has been obscured to many minds by much untidy thinking, and is encumbered with the kind of error which is only recognised as error after practical mischief has been done. The particular mischief now in view is that of the "Disestablishment" and "Disendowment" of the Welsh Church. The case for Disendowment has never been rich in

intellectual content, nor has the need for such been seriously felt. To its supporters in Wales the one solid and sufficient argument has been the possession of a majority; the present urgency of their demand is inspired by the well-grounded fear that their majority is evaporating. But for the moment it exists; its decision is sacrosanct; and even the appointment of a Commission to ascertain the facts is treated as a profanation of the divinity that ought to hedge it. The livelier wits, however, are sensible that, on such a matter, decency requires some better argument than that of *force majeure*; and attempts are being made to find grounds in principle, and in historical principle. In these last weeks an appeal has begun to be made to a well-known work of historical learning, the late Professor Maitland's book on *Roman Canon Law in the Church of England.* Our own purpose is to look into this book, and see whether it will bear the weight which is being put upon it. Its author, now unhappily deceased, was Downing Professor of the Laws of England in the University of Cambridge. As a scholar, a personality, and a historian of law, his fame is world-wide. In investigating the history of the law of marriage he found himself trespassing—it is his own word—in "an unfamiliar region," that of ecclesiastical jurisprudence.

"After some study," he tells us in his Preface, "which must not be called prolonged or profound, but none the less was unprejudiced, I discovered that I was slowly coming to results which, though they have not wanted for advocates, have not been generally accepted in this country by those whose opinions are the weightiest, and have recently been rejected by the report of a Royal Commission signed by twenty-three illustrious names." The Commission referred to is that appointed in 1881 to inquire into the constitution and working of the Ecclesiastical Courts. Its Report, presented in 1883, had a powerful effect in establishing those views of ecclesiastical history which had been more and more gaining ground in England since the time of the Oxford Movement. Its influence is seen in the speech in which the present Prime Minister introduced the Welsh Disestablishment Bill of 1895. "I am not," said Mr. Asquith, "one of those who think, as used to be currently assumed, that the legislation of Henry VIII. transferred the privileges and endowments of a National Establishment from the Church of Rome to the Church of England. I believe that view rests upon imperfect historical information. I am quite prepared to admit, what I believe the best authorities of history now assert, that there has been,

amidst all these changes and developments, a substantial identity and community of existence in our national Church from earliest history down to the present time."[1]

The most illustrious of the names attached to this epoch-making report was that of William Stubbs, afterwards Bishop of Chester and Oxford. One of the greatest historians of this or any age, he had made his own, and reconstructed from its foundations, the history of the mediæval English Constitution. His word, on questions of history, was decisive with the Commissioners; and large portions of his historical memoranda were incorporated in their Report. This was the case with those passages, relating to the nature and status of the mediæval Canon Law, which Professor Maitland subsequently impugned. It will be convenient therefore to deal with the problem with which we are concerned simply as an issue between Stubbs and Maitland. According to Dr. Stubbs, the English Church, before the Reformation, possessed, as her own, a body of ecclesiastical law which had binding authority in the English Church courts. The general Canon Law of the Church, as embodied in the successive papal compilations, was of great authority, but not in itself, in England, of binding effect. Professor Maitland con-

[1] *Speeches of the Rt. Hon. H. H. Asquith*, p. 109.

tends, on the other hand, that the Roman Canon Law, or, to give it its own chosen designation, the Jus Commune of the Church, was the really operative law in the church courts of England as elsewhere; that, apart from a few minor rules of custom, it overrode, *ipso facto*, any prescriptions of English ecclesiastical law which ran counter to it; that such exceptions as existed to its effective operation are to be found in the sphere of State, and not of Church law; and that such ecclesiastical law as could call itself English, so far from holding a prerogative position, was utterly meagre both as regards content and import. Maitland then assumes — for assume is exactly the right word—that the measures of the Reformation effected a radical change in the status of the existing Canon Law, such being its nature; the implication being that in this department at any rate there was a clear breach with the past, that the Anglican presumption of continuity must be so far abandoned, and the papist argument, so far, accepted as valid.

Professor Maitland's book is undeniably important. It is a valuable plea for clear thinking, though stronger, we hope to show, on the side of precept than example. It handles difficult legal and constitutional problems with uncommon brightness and lucidity.

Published in 1898, it attained an instant vogue, especially, we gather, in our seats of learning.[1] The modern undergraduate, always a little in advance of his age, will tell you that among competent persons Maitland's estimate of things mediæval has entirely superseded that of Stubbs and the school of which Stubbs was the commanding figure. In these last times it has been haled from the lecture-room into the street, and become the *pièce de résistance* of popular "Liberationism." In a very recent deliverance setting forth the legal case for Disendowment, Mr. Ellis J. Griffith, K.C., M.P., leader of the Welsh Liberal members in the House of Commons, lays down the position as follows :—

"Modern historical research, since the date of the discussion on the question in the House of Commons in connection with the Welsh Disestablishment Bill of 1895, has completely shattered the theory of continuity put forward by the late Professor Freeman and Lord Selborne. Professor Maitland, in his work on the Roman Canon Law in the Church of England, has advanced arguments to establish the absolute identity"—will the reader please note ?—"of the ecclesiastical legal system of the pre-Reformation Church of England with

[1] See Appendix B.

that of the contemporary Church of Rome, which the controversialists on your side have never attempted to answer." [1]

Long before Professor Maitland's book began to be converted to these mundane uses, it appeared to the present writer that these and suchlike estimates of its effect had a decided savour of extravagance. A closer acquaintance with it has confirmed the impression. In the following chapters we shall put the question whether Professor Maitland's authority is really so decisive as it has become the fashion to assert. We shall endeavour to examine the issue between Stubbs and Maitland, and to ascertain what really was the nature and status of the Canon Law as practised in England before the Reformation. While the operation is proceeding, the reader will be pleased to dismiss from his mind "Disestablishment and Disendowment" and all connected with it. The question before us is one of pure history; and if the truth is to be found, it must be sought without regard to implications and consequences.

[1] Letter to Mr. Ll. Hugh Jones, secretary to the St. Asaph Church Defence Committee, 12th October 1911.

II. THE ELDER DOCTRINE

Our first task is to get the issue clear. In the beginning of Professor Maitland's second chapter we read as follows :—

"In much of what has been written by historians and said by judges touching the fate of 'the Roman' or 'the foreign' canon law in England there seems to me to be a tendency towards the confusion of two propositions. The first is this : that in England the state did not suffer the church to appropriate certain considerable portions of that wide field of jurisdiction which the canonists claimed as the heritage of ecclesiastical law. The second is this : that the English courts Christian held themselves free to accept or reject, and did in some cases reject, 'the canon law of Rome.' The truth of the first proposition no one doubts ; the truth of the second seems to me exceedingly dubious. At any rate we have here two independent propositions, and we do not prove the second by proving the first."

This we grant. The former proposition

requires no proving; but if we can prove the latter, namely, "that the English courts Christian held themselves free to accept or reject, and did in some cases reject, 'the canon law of Rome,'" then one thing will be no longer dubious: which is, that Maitland's contention falls to the ground. For his contention is that within the sphere of ecclesiastical law, where there was no interference on the part of the State, the papal law was administered as of positive and binding authority, and that it overrode, *ipso facto*, any prescription of English church law which might happen to be opposed to it.

To begin with, we observe that Maitland does not appear to grasp the bearing or the breadth of the proposition which he writes to challenge. That proposition is that "the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts."[1] Here are a positive and a negative statement; they stand together; and each is to be limited and interpreted by the other. Maitland ignores the positive statement; and he denies the negative, asserting the contrary. His suggestion is that the papal law *was* held to be binding on the courts. The careful reader will note that throughout his argument he recognises no

[1] Maitland, p. 2; *Commission Report*, p. xviii.

kind of authority but that which is positive and binding, which is operative as being enforced. Speaking of a certain papal decretal (p. 10) he says: "Such a statute you can obey, or you can ignore; no third course is open to you. If you deny that it binds you, then you allow it no 'great authority'; you allow it no authority whatever." This is, we suppose, the attitude of the common law mind, but it is surely not the only one possible. It would not represent the mind of the modern international lawyer, or of the mediæval canonist; it is certainly not the mind of the profound historian whose position Maitland attempts to overthrow. Stubbs says positively that the papal law, though not held to be binding on the courts, was always regarded as of great authority. What does he mean? Has he a meaning? Can we grasp it? Has Maitland grasped it? From his own expressions we should gather not. He says: "It may be admitted that the difference between 'great authority' and binding force is somewhat fine" (p. 2). On the contrary, the difference is plain, great, and fundamental; so much so that by his failure to recognise it, his whole argument is compromised from the outset. Either there are, or there are not, facts which can only be interpreted by such a distinction. If there are, then to ignore the distinction will be to

misinterpret the facts. That there are such facts the reader may discover without going beyond the covers of Maitland's book.

Now this distinction, which Maitland ignores and in effect rejects, lies upon the very face of the passages which he selects for animadversion. There is first the passage given above from the text of the Report, telling us that "the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts." The other passages occur in the Historical Appendix (1), which was the work of Stubbs and the whole basis of this section of the Report. We give this extract from the Appendix at length, printing in italics the particular phrases in it which are the subject of Maitland's challenge.

"Any changes (as a result of the Norman Conquest) in the character of the law administered in the English church courts, whether gradual or rapid, must have rather resulted from improvements in the scientific study than from the imposition of any new code. As a matter of fact, no new code of ecclesiastical law ever was authoritatively imposed, and *attempts to force on the church and nation the complete canon law of the middle ages were always unsuccessful.* The declaration of the law still remained chiefly in the mouth of the judge, who declared it out of his own know-

ledge and experience without reference to an authoritative text. He was supposed to be educated in the legal system of the church, of which the collections of canons were *manuals but not codes of statutes*; if he erred, his error could be corrected at Rome if the suitor were able to reach the supreme court of church judicature there.

"The laws of the Church of England from the Conquest onwards were, as before, the customary church law developed by the legal and scientific ability of its administrators, and occasionally improved and added to by the constitutions of successive archbishops, the canons of national councils, and the sentences, or authoritative answers to questions, propounded by the Popes. Many of their constitutions, canons, and regulations had but temporary force, and much of the ecclesiastical legislation of the twelfth century, as of the preceding centuries, survived only in the pages of the chronicles. The Decretum of Gratian, the basis of the text of the Roman church law, came into common though not authoritative use; and the great prelates of the thirteenth century, whose dates coincide with the beginnings of the growth of statute law of England, gradually developed that independent and imperfect system which prevailed in England until the Reformation, the text-books

of which were John of Ayton's commentaries on the constitutions of Otho and Othobon, and the collection of provincial constitutions, subsequently arranged and systematised by Lyndwood in the Provinciale.

"*The laws which guided the English courts up to the time of the Reformation may then be thus arranged :—*

"1. *The canon law of Rome, comprising the Decretum of Gratian, the Decretals of Gregory* IX., *published in* 1230, *the Sext, added by Boniface* VIII., *the Clementines issued in* 1318, *and the Extravagants or uncodified edicts of the succeeding Popes.*

"*A knowledge of these was the scientific equipment of the ecclesiastical jurist, but the texts were not authoritative.* The English barons and the king at the Council of Merton refused to allow the national law of marriage to be modified by them, and it was held that they were of no force at all when and where they were opposed to the laws of England.

"2. The civil law of Rome was, so far as procedure went, an important part of legal education, but this, from the reign of Stephen onwards, was refused any recognition except as a scientific authority in England, was kept under even more jealous restrictions than the canon law, and was only tolerated in those departments of law, such as the maritime

and matrimonial, for which the national law afforded no adequate directions, and in which it was especially important that English practice should agree with that of foreign nations.

"3. *The provincial law of the Church of England contained, as has been stated, the constitutions of the archbishops from Langton downwards, and the canons passed in the legatine councils under Otho and Othobon. The latter, which might possibly be treated as in themselves wanting the sanction of the national church, were ratified in councils held by Peckham.* The commentaries of John of Ayton and the carefully edited digest of Bishop Lyndwood were the finally received texts of this portion of the law, and contained large extracts from the civil and canon law of Rome; but the comments were not, any more than the secular treatises of Bracton, Britton, and Fleta, received as equal in authority to statute law." [1]

[1] Hist. App. (1), p. 25.

Cf. "*The constitutions of the archbishops, from Stephen Langton downwards, and the canons passed in legatine councils under Otho and Othobon, ratified by the national Church under Archbishop Peckham, were finally received as the texts of English Church law, under the hands of the commentators, John of Ayton and William Lyndwood. These commentators introduced into their notes large extracts from and references to both the canon and the civil law of Rome, but these were not a part of the authoritative jurisprudence*" (*Commission Report*, I, xviii). Note that here the Report, in paraphrasing and compressing the corresponding passage in the Appendix, overlooks Stubbs' careful words, "this portion of the law"; Maitland overlooks them equally.

Now what do we gather from the above Appendix? We gather that the church law of England in the Middle Ages consisted—

A. Partly of the canons and constitutions of national and provincial councils, which, as digested by Ayton and Lyndwood, were of legal authority and binding on the courts.

B. Partly of the Roman Canon Law, the collections of canons and papal decretals, which were—

(*a*) of scientific authority, as the subject-matter of legal education; and

(*b*) of legal authority and binding on the courts, in so far as they were

We observe that Mr. A. T. Carter, in his *History of English Legal Institutions* (p. 232 note), says:—

"Inasmuch as the late Bishop of Oxford, who drew the Commissioners' Report, intimated to me, sometime before his death, that he was not prepared to dissent from Professor Maitland's view, that view may be considered for the present as authoritative."

We should like some evidence that Stubbs "drew the Commissioners' Report." It seems to us unlikely for more than one reason, chiefly because the Report lacks those exquisitenesses of scholarship which appear in the Appendix and which were second nature with Stubbs. As to his statement that he "was not prepared to dissent from Professor Maitland's view," it may mean, to those who knew the Bishop, several things. What was true in Maitland's thesis he had himself affirmed a generation before; the rest could be left to time. He was old and occupied; he was very humble: he was not only a profound scholar, but, under provocation, an innocently profane jester: the possibility that the academic world would be led captive for a time by Maitland's brilliance, and that he himself would be displaced from his pedestal of authority in the Oxford History School, would have appealed to his humorous imagination as the best of reasons for not interfering. We see no reason to think that his acquiescence implied agreement.

> not repugnant to "the laws of England." When opposed to those laws, "they were of no force at all."

Maitland, of course, admits this last proposition so far as regards those laws of England which belonged to the State; he denies it as regards those laws of England which had been enacted, in national and provincial councils, by the English Church. That is to say, where A and B are in collision, it is B, the Roman-made, and not A, the English-made, law which is legally authoritative and binding on the courts.

Here is a simple issue of fact, which shall be dealt with in its place. For the present, we need to understand more fully the position of Stubbs, in order to see what are likely to be the consequences of failing, as Maitland does, to grasp it altogether. And we have, as Maitland had, the material to hand, and it is rather too valuable to neglect. At the very time when Stubbs was busy with his memoranda for the Commission, he was also lecturing at Oxford on "The History of the Canon Law in England" (April 19, 1882). His two lectures were included in the volume entitled *Seventeen Lectures on the Study of Mediæval and Modern History*, published in 1886, a dozen years before the date of Maitland's

book. The first of these lectures gives an ampler treatment of the subject than would have been within the scope of such a document as the above Appendix; it shows that their author had a clear and decided meaning in speaking of the Roman Canon Law as of great but not binding authority in England. It will be useful for the reader to have the material passages before him; he will the better appreciate how entirely consistent Stubbs' teaching on this matter has been. Beginning on p. 301 we read :—

"The real founder of the mediæval canon law jurisprudence in England was Theobald, Archbishop of Canterbury, who was consecrated in 1139 and ruled the Church until 1161. . . . John of Salisbury, the philosopher and historian, was, as secretary to Archbishop Theobald, the ancestor of the diocesan chancellors, officials and vicar-generals, who begin to execute with more regularity and intelligence the law of the Church. . . . But that was not all. In the year 1149 Theobald brought from Lombardy and settled at Oxford as a teacher Master Vacarius, who had given himself to the study of the Code and Digest, and drawn up handbooks of procedure sufficient to settle all the quarrels of the law schools. Stephen, the reigning king, set himself steadfastly against this new teaching and expelled Vac-

arius; . . . the civil law was for the time banished. In the year 1151 Gratian completed the Decretum, the concordance of the canon laws; and they shortly found their way to England, where, however, they were scarcely more warmly received than the civil laws had been, but were not directly banished.

"The first result perhaps of these novelties, so far as English law is concerned, was the improvement in legal education. Although Bologna and Pavia could not be suffered to come to England, England might go to Bologna; and a stream of young archdeacons, at the age at which in England a boy is articled to an attorney, poured forth to the Italian law schools. . . .

"Great as the advantages might be of an improved code of laws and system of procedure, neither the canon law nor the civil law was accepted here; they were rejected not only by the stubborn obscurantism of Stephen, but by the bright and sagacious intellect of Henry II. . . . I will only mention two points that illustrate his permanent relation to the subject: first, his Assize of Darrein Presentment removed all questions of advowsons and presentations from the ecclesiastical courts where they were the source of constant appeals to Rome; and secondly, by the Constitutions of Clarendon he did his best to limit the powers

of the ecclesiastical lawyers in criminal matters and in all points touching secular interests. Against this must be set the fact that to his days must be fixed the final sliding of testamentary jurisdiction into the hands of the bishops, which was by the legislation of the next century permanently left there, in a way which, however accordant with the policy of the Papacy, was an exception to the rule of the rest of Christendom. Henry, although not by any known assize or constitution, must have restrained the ecclesiastical judicature from interfering in secular matters, except in the two points of matrimony, which was closely connected with a sacramental theory, and of testamentary business. These two, however, furnished matter sufficiently remunerative for a school of church lawyers; and the more distinctly ecclesiastical jurisdiction over spiritual things and persons provided much more. A thoroughly learned class of civil and canon lawyers is required over and above the thoroughly learned class of common law and (to anticipate a little) chancery lawyers of the royal courts. . . .

"As we proceed, however, we are struck more and more with the prominence of the scientific element in legal education. The great compilations are not received as having any authority (Stubbs here means any positive

authority as law) in England, but they are the sole legal teaching which is to be obtained in the schools where Englishmen go to learn law. The common law judges may not be canonists or civilians, but the statesmen, in many cases at least, are; certainly archbishops Langton and Boniface and Peckham and Winchelsey.

"Whilst the study of these foreign systems was becoming increasingly important and increasingly common, the popular dislike of foreign law was not in the least diminished. I must here couple the two Roman systems together, for to all purposes of domestic litigation they were inseparable: the 'canones legesque Romanorum' were classed together and worked together, mainly because it was only on ecclesiastical questions that the civil law touched Englishmen at all, but also because without the machinery of the civil law the canon law could not be worked; if you take any well-drawn case of litigation in the middle ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the Code and Digest are at least as numerous as from the Decretum. Moreover, the accretions of the Decretum, the Extravagants as they were called, that is, the authoritative sentences of the Popes which were not yet codified, were many of them con-

veyed in answers to English bishops, or brought at once to England by the clergy with the same avidity that lawyers now read the terminal reports in the *Law Journal*. . . . In the year 1230 Gregory IX. had approved of the five books of Decretals codified by Raymond of Pennafort from the Extravagants of the recent Popes and added to the Decretum of Gratian. In 1235 Matthew Paris tells us the Pope was urging the adoption of them throughout Christendom. But they were not received in England, although they continued to be the code by which English causes were decided at Rome, and began to be an integral part of the education of English canonists. And here again we have to distinguish between the scientific or implicit and the explicit authority of these books. Great as the influence of Justinian's code has been, there are very few countries in Europe where it has been received as more than a treasury of jurisprudence; . . . So in England neither the civil law nor the canon law was ever received as authoritative, except educationally, and as furnishing scientific confirmation for empiric argument; or, in other words, where expressly or accidentally it agrees with the law of the land. Nay, the scientific treatment itself serves to confuse men's minds as to the real value of the text; and in both laws the opinions of the glossers

are often cited as of equal authority with the letter of the law or canon.

"But this same date 1236 brings me to another point; the beginning of the Codex receptus of Canon Law in England. . . . Just as the statute law of England begins with the reign of Henry III., so does the codification of the national canon law. Archbishop Langton's Constitutions may be set first, but next in order, and even of greater authority, come the Constitutions of the legate Otho, which were passed in a national council of 1237. After these come Constitutions of the successive archbishops, especially Boniface of Savoy and Peckham, which were drawn up in a very aggressive spirit; Boniface taking advantage of Henry III.'s weakness to urge every claim that the English law had not yet cut down, and Peckham going beyond him in asserting the right of the Church against even the statutable enactments of the State. Between Boniface and Peckham in the year 1268 come the Constitutions of Othobon, which were confirmed by Peckham at Lambeth in 1281, and which, with those of Otho, were the first codified and glossed portions of the national church law. In the reign of Edward III., John of Ayton, Canon of Lincoln, an Oxford jurist it is said, collected the canons adopted since Langton's time and largely annotated the Constitutions

of Otho and Othobon. Contemporaneously with this accumulation of national materials, the Corpus Juris of the Church of Rome was increasing; Boniface VIII. added the sixth book to the five of Gregory IX., and John XXII. added the Clementines in 1318; and his own decisions, with those of the succeeding popes, were from time to time added as Extravagants unsystematised. The seventh book of the Decretals was drawn up under Sixtus V. as late as 1588; so that practically it lies outside our comparative view. Of course very much of the spirit of both the Sixth and the Clementines found its way into England, but the statute law was increasing in vigour, the kings were increasing in vigilance, and after the pontificate of Clement V. the hold of the Papacy on the nation was relaxing. Occasionally we find an archbishop like Stratford using the papal authority and asserting high ecclesiastical claims against the king, but the age of the Statutes of Præmunire and Provisors was come, and no wholesale importation of foreign law was possible. Not to multiply details, I will summarily state that in the reign of Henry V. William Lyndwood, the Dean of the Arches, collected, arranged, and annotated the accepted Constitutions of the Church of England in his Provinciale, which, with the collections of John of Ayton generally found in the

same volume, became the authoritative canon law of the realm. It of course was proper in the first instance to the province of Canterbury, but in 1462 the Convocation of York accepted the Constitutions of the southern province as authoritative wherever they did not differ from those of York, and from the earlier date the compilation was received as the treasury of law and practice. . . . Still, authoritative as Lyndwood's code undoubtedly was, it was rather as the work of an expert than as a body of statutes that it had its chief force. The study of the canon law was a scientific and professional, not merely mechanical study; and just as much was the study of the civil law also. . . .

" England has then for at least two centuries before the Reformation a body of law and a body of judges, for ecclesiastical and allied questions, quite apart from the law and judicial staff of the secular courts; and, with the growth of the Universities, she begins to have educational machinery for training her lawyers. In this department of work, however, the scientific study has a long start and advantage over the empirical. The common law has to be learned by practising in the courts, or by attending on their sessions. The apprentices and serjeants of the Inns of Court learn their work in London; their study is in the year

books and the statute book, a valuable and even curiously interesting accumulation of material, but thoroughly insular, or less than that, simply English. The canonists and civilians have also their house in London, the 'Hospitium dominorum advocatorum de arcubus,' but they are scarcely less at home at Rome and Avignon. The canonist and civilian learn the legal language of entire Christendom; the London lawyer sticks to his Norman-French. The Norman-French of Westminster is unintelligible beyond the Channel and beyond the border. Scotland, the sister kingdom, is toiling without a common law system at all until, in the sixteenth century, James v. introduces the law of Justinian as her treasury of common law, and thus gains University training and foreign experience for her lawyers; but England has an ancient system and is content with her own superiority; her common law is of native growth, strengthening with the strength of her people; she sees the nations that have accepted the civil law sinking under absolutism; as distinctly as ever 'non vult leges Angliæ mutari.' But she has ceased to banish the skilled jurist. Oxford and Cambridge have their schools of both the faculties; . . . with regular schemes of lectures, fees, and exercises; the doctor of the civil law had to prove his knowledge of the Digest

and the Institutes; the doctor of the canon law must have worked three years at the Digest and three at the Decretals, and studied theology also for two years. It is, you observe, not the national church law, but the universal or scientific material, on which he is employed."[1]

The reader has now before him three statements of the position, the brief summary of the Commission Report, the more extended notice of the Historical Appendix, and the ample treatment of this Oxford Lecture. All are from the same source, and their teaching throughout is perfectly consistent. They show precisely what is meant by speaking of the Canon Law of Rome as of great authority but not binding force. Had Maitland done justice to the third and second, he would have found no difficulty in interpreting the first. As it is, he is constrained to write of it as follows: "It may be admitted that the difference between 'great authority' and binding force is somewhat fine; still it seems to me that the words here chosen suggest, and were meant to suggest, analogies which are to my mind misleading. The English ecclesiastical courts are supposed to manifest for 'the canon law of Rome' the respect which nowadays an English court will pay to an Ameri-

[1] Stubbs, *Seventeen Lectures on the Study of Mediæval and Modern History*, pp. 301–12.

can or an Irish decision, or perhaps that higher degree of respect which one English court of first instance will pay to the decision of another, or perhaps some yet higher degree" (p. 2). No such analogy is in fact suggested. Neither does Stubbs say that "the canon law of Rome was not regarded as statute law by the English ecclesiastical courts"; on the contrary, he allows that so much of it as was not inconsonant with the law of the land was of unquestioned legal validity. When Maitland contends, as against Stubbs, "that in all probability large portions (to say the least) of 'the canon law of Rome' were regarded by the courts Christian in this country as absolutely binding statute law," he is really reaffirming part of Stubbs' position, and showing that as a whole he has failed to grasp it. The really misleading analogies are suggested by Maitland's continual use of such phrases as this of "absolutely binding statute law." As applied to the Middle Ages, they can hardly be called history. Before you can have "absolutely binding statute law" you must have a strong central power; and mediæval history turns largely upon the effort of the central power, ecclesiastical and civil, to ascend from a position of weakness to one of strength, and to subordinate or suppress the countless local franchises and jurisdictions which were every-

where in vigorous existence. Nowhere was that effort more strenuous and successful than in England; yet even in England it was not until the wars of the Roses had sapped the strength of the baronage and the coincident rise of a commercial middle class had given the Crown a new fulcrum of authority, that the age of full and effective statutory legislation begins. No phrase which suggests the analogy of a modern English Act of Parliament in normal operation can be applied with safety to mediæval conditions. A truer, though of course an incomplete, analogy would be found in an Act of Parliament which could only operate through the machinery of local government, and which the organs of local government might in fact refuse to administer. An instance occurred a few years ago, in the 'revolt' of the united County Councils of Wales against the Education Act of 1902. The Act was good 'statute law'; it undoubtedly "proceeded from a legislator whose commands" the County Councils "were bound to obey." In fact they did not obey; and the Crown hesitated—for much the same reasons as the Popes, in like circumstances, hesitated—to take decisive measures to enforce obedience. Such measures were of course available; they always are, against those who are recreant to the spirit of the

Constitution. The Treasury might have laid the recalcitrant Councils under a financial interdict; the Courts might have committed their members for contempt. As it happened, the situation was resolved in milder ways. The ultimate sanction of the law of Parliament is the conscience, the better conscience, of the people. Those good Welsh consciences which had 'revolted' against the Act began, presently, to revolt yet more against the miserable shifts employed in defiance of it; innate decencies came uppermost; and the 'no-rate policy' died a natural death and received a dishonoured and surreptitious burial. So too the ultimate sanction of the papal law was the Christian conscience. When the Popes legislated for the good of the Church, as true Servants of the servants of God, their ordinances were received with reverence and without question. But where papal legislation was in the nature of a 'job,' whose object was to fill coffers and fatten favourites, there it had to reckon, in England and elsewhere, with the organs of national government, of which, for reasons of decorum and convenience, the secular rather than the ecclesiastical would play the leading part. However unexceptionable as 'statute law,' an objectionable bull which arrived at Calais on the way to Dover was embarking on an adventurous voyage. It

might, by good fortune, get as far as Lambeth, and no archbishop would put it in the fire; but he might surrender it, on demand, to the king's officer, and not trouble himself further as to what became of it. The law of it might be unimpeachable, but it was not the law of England; and if it was opposed to the law of England, whether in Church or State, it was, as Bishop Stubbs has told us, "of no force at all." And if, in spite of this, the courts Christian, for any reason, attempted to give effect to it, they were met at once by writs of 'prohibition,' if not by even more formidable writs, of which we shall have occasion to speak presently.

But this is not all. Maitland's language about "papal statute-books" and "absolutely binding statute law" is inadmissible for another reason. That reason lies in the character of the law itself. Much of it possessed a strong moral claim to statutory binding authority. We refer to those portions of it which, though promulgated by the Popes, had been enacted in General Councils in which the various nations and churches of the West had rights of representation. Such legislation could claim a very different degree of constitutional authority from that of mere legal dicta occurring in decisions of particular causes. These latter formed a very large element in the Corpus Juris; as long as they

stood, they were certainly law; but they were just as certainly not 'laws,' and palpably not 'statute laws.' Before they could even become operative as law, they had to be disengaged from the particular causes which occasioned them, incorporated in the general body of the law, and treated as parts in relation to the whole by the science of the trained jurist. They required accommodation, adaptation, interpretation, at every turn. Indeed, the most striking feature about the growth of the Canon Law is its dependence upon the skilled jurist. The men who had really most to do with the building up of the Corpus Juris were not Popes at all, but, so to say, Professors. As we make our way about these so-called statute-books, we are continually in contact with a dozen or so of illustrious names, the names of the men who, from the time of Gratian onwards, devoted themselves to transforming chaotic masses of disciplinary regulation, of every age and kind and degree of authority, into an ordered and opulent treasury of jurisprudence, at once a field of scientific training and an authoritative guide to legal practice. Readers of Maitland are acquainted with some of them, with Petrus de Ancharano, Antonius de Butrio, Dominicus de Sancto Geminiano, Johannes ab Imola, Johannes Andreas, Zenzelinus, William Durant, William

de Mont Lezun, Henry de Bohic, John de Lignano, Guido de Baysio. With these men and their imposing science lay the last word as to the admission or the operation of a papal decretal. And we cannot but think that compilations of law which depend so completely upon the scientific labours of such men, are very unhelpfully described as 'statute-books.' We agree with Maitland that they are more than 'manuals'; but if we borrow Stubbs' ampler phrase and call them treasuries of jurisprudence, we shall be regarding them in something like their true character.

So far we have endeavoured to show that Maitland has mistaken the bearings of Stubbs' position, and has imported into the discussion certain notions of statutory binding authority which have really small relation to it. But we cannot leave the matter here. Stubbs' teaching, though clear as to the point on which Maitland mistakes it, is not so clear as to another issue which is germane to this inquiry. For proper understanding, it requires an appreciation of his special point of view, and also an accuracy of reading which presumes a degree of prior knowledge. When Stubbs speaks of the papal as 'foreign' in distinction from the 'national' church law, he is speaking from the standpoint of the common lawyer or the historian of the secular

Constitution; and his language, from that standpoint, has behind it a good historical tradition going far behind the Reformation statutes. It is important to remember, however, that the mediæval canonist, however little of a papalist he might be, would have objected to it with energy. He would have protested that such language raised, and begged, large questions which had better be avoided; that the so-called 'national' and the so-called 'papal' law were essentially one; that the relation between them was a family and filial relation; and that the quarrels between them, so far as they existed, were of the nature of household quarrels, of which it was possible, and extremely mischievous, to make too much. Lyndwood, in converse with one of the common law judges, would have said: "You know, my brother, such expressions are unprofitable; they are mere rhetoric, and they bode no good to the peace of Church or Realm. I pray that you will not use them except under the most real provocation. I trust that the Holy Father will refrain from acts which afford such provocation; and in my own small sphere as presiding judge of the courts of Canterbury, I shall always do my best to avoid them. What we have to do, you and I, is to work, in our several offices, for the right government of Christian souls; and to refrain, either of

us, from acts and words which might render our common task more difficult." Such a plea would have been perfectly sound, and would have breathed the true spirit of the existing Constitution. It was the fact that the papal Decretals and the Provincial Constitutions professed to be, and in substance were, alike expressions of the Jus Commune of the Church. In England, and from any point of view, there was no essential distinction between them as regards legal validity, or binding effect upon the courts. The actual distinction which existed was accidental. It arose naturally from the fact that law made in an English Convocation would take account of English secular conditions and established usages of English Church law in a way in which the general papal legislation would not. Where no such prudent account was taken, as in the case of those enterprising enactments of Boniface and Peckham to which Stubbs has referred us, the constitutions in question were, legally, as nugatory as any similar decretal. And this, when we read him accurately, is exactly Stubbs' position. It is not to the Provincial Constitutions as such that Stubbs attributes any explicit legal authority; but to the 'accepted' Constitutions as collected, arranged, and annotated by Lyndwood. It was the law of the 'Pro-

vinciale,' with the commentary of John of Ayton on the National Constitutions promulgated by the legates Otho and Othobon, that "became the authoritative canon law of the realm." As such the authority quite truly ascribed to it differs in kind from the "scientific or implicit" authority attributed in general to the great papal law-books. The whole point, which is vital, is completely missed by Maitland. The strangest thing about his work is the degree in which he has mistaken the entire scale and scope and character of Lyndwood's book. The very virtue and genius of the 'Provinciale' is that, taking the Provincial Constitutions as text and basis, it sets them in proper working relations, on the one hand with the imminent common law of England by which they were limited, on the other hand with the circumambient papal law, by which they needed to be developed and amplified. With Maitland's description of the 'Provinciale' as "an elementary law-book for beginners" we shall deal in good time. As a matter of fact, it was a great legal eirenicon, and it occupied a foremost place in relation to the ecclesiastical polities of its age. Of course if it is true, as Maitland tells us, that the book is animated by "a stark papalism," then Stubbs, in ascribing to it an explicit legal authority which he denies to the

papal compilations, will be talking nonsense; but, as we shall see, Lyndwood was as little given to Papalism as Stubbs was given to nonsense; the truth being that it is Maitland who has failed to grip the mind of either. So failing, he is led to state the opposing case in terms which involve the argument in an atmosphere of prejudice. We must take exception altogether to such expressions of it as that "the English courts Christian held themselves free to accept or reject, and did in some cases reject, 'the canon law of Rome.'"[1] If Maitland intends to maintain the particular negative proposition that the English Church possessed no body of law which was of substantive legal authority, and operative, on occasion, even as against the decretals, then he can be refuted on the facts, and the facts as given by his witness Lyndwood. But if, on the other hand, his proof is directed to the positive general proposition that 'the canon law of Rome' was received in England and recognised, with limitations and accommodations, as an integral element in the law of England, then our answer is that the proposition requires no proving. It is one of the solid commonplaces of history. Take, for example, the following page from a famous standard work:—

[1] Maitland, p. 51.

"The laws made by spiritual authority for the spiritualty, by the clergy for the clergy, include, so far as mediæval history is concerned, the body of the Canon Law, published in the Decretum of Gratian and its successive supplements, such particular edicts of the popes as had a general operation, the canons of general councils, the constitutions of the legates and legatine councils, ... the constitutions published by the archbishops and the convocations of their provinces, and those of individual bishops made in their diocesan synods. All these may be included under the general name of Canon Law; all were regarded as binding on the faithful within their sphere of operation, and, except where they came into collision with the rights of the crown, common law or statute, they were recognised as authoritative in ecclesiastical procedure.

"In the general legislation of the church, the English church and nation had alike but a small share; the promulgation of the successive portions of the Decretals was a papal act, to which Christendom at large gave a silent acquiescence; the crown asserted and maintained the right to forbid the introduction of papal bulls without royal licence, both in general and in particular cases; and the English prelates had their places, and the ambassadors accredited by the king and the

estates had their right to be heard, in the general councils of the Church. But except in the rare case of collision with national law, the general legislation of Christendom, whether by pope or council, was accepted as a matter of course."

The above is taken from the great *Constitutional History of England* (iii. 348) published, as long ago as 1873, by William Stubbs.

III. THE 'JUS COMMUNE' AND THE COMMON LAW OF ENGLAND

We are about to look into the 'Provinciale,' and it will be well, before doing so, to know something of the author. He is Maitland's chief witness, and ours. Maitland introduces him to us as follows :—

"The principal witness whom we have to examine, if we would discover the theory of law which prevailed in our English ecclesiastical courts about a hundred years before the breach with Rome, is indubitably William Lyndwood. He finished his gloss on the provincial constitutions of the archbishops of Canterbury in the year 1430. When he was engaged on this task he was the archbishop's principal official; in other words, his position made him the first man in England whose opinion we should wish to have about any question touching the nature of the ecclesiastical law that was being administered in England. He held the great prize of his profession. He had also been the prolocutor of the clergy in the convocation of Canterbury. Of his learning

and ability it would be impudent for me to speak; but, even if some of his citations of old books were made at second hand, it is plain that he was learned. He commanded a large library and had read many modern books, the books of Italian and French canonists. He refers not only to most of the great doctors of the fourteenth century, but also to Petrus de Ancharano, Antonius de Butrio, and Dominicus de Sancto Geminiano, all of whom lived into the fifteenth, and to Johannes ab Imola, who was still living. Evidently he was on the outlook for the newest literature (provided that it was strictly orthodox), and his travels on the continent enabled him to collect it. Probably we ought to have other works of his besides the Provinciale, for he speaks as though some of his lectures upon the Decretum were in circulation. Now we may well be prepared to hear from competent critics that in one sense he was no fair representative of the English canonists, since he was pre-eminently learned and pre-eminently able. The mere fact that he wrote a book raises him above his fellows. But I suppose that in the main we may trust him to say what they think, and at any rate he will state the law that he administers in the chief of all the English ecclesiastical courts. His frequent employment in the king's diplomatic service would be enough to show

that he was no mere bookworm. The very early date at which his book was first printed and the subsequent editions of it are a testimony to the high repute in which it stood before the Reformation" (pp. 5–6).

Apart from the characteristic jibe about the English canonists, for which there is neither warrant nor occasion, the above account is useful. That Lyndwood was peculiar—not quite peculiar, as it happened—in writing a book need merely show that he may have had peculiar occasion for writing it. But taking the book as written, however it may reflect upon the learning and ability of Lyndwood's brethren—as to which, in fact, it shows nothing whatever—let us see what it has to tell us with regard, for example, to the position of Mr. Ellis J. Griffith, K.C., M.P., who maintains, on the alleged authority of Maitland, "the absolute identity of the ecclesiastical legal system of the pre-Reformation Church of England with that of the contemporary Church of Rome." Is it, in fact, true that the law administered in the church courts of England was absolutely, or even substantially, identical with that administered in the Court of Rome?

We shall have, of course, in this inquiry to take account of circumstances of omission as well as of commission. If we find that considerable portions of the Canon Law of

Rome were actually inoperative in the English church courts, the fact will remain, in whatever degree it may have been due to the restraining action of the civil power. The significance of such restraint will require to be considered; but, however interpreted, its effect will be the same.

We shall begin by taking three important branches of jurisdiction; and first, that which concerned matrimonial causes. It is of interest to remember that it was an inquiry into the history of the law of marriage which led Maitland to embark upon his investigation. It happens to have been the one sphere of jurisdiction in which there was something like absolute consent as between the church law of England and the Jus Commune. The important practical directions relating to it are embodied in the Provincial Constitutions;[1] but those of them which are incorporated in Lyndwood's digest are only four in number. Maitland makes merry over the fact, contrasting it with the fullness of treatment in the Gregorian collection of Decretals. It is the sort of mirth which comes very easy to a great scholar when he condescends to fisticuffs with men of straw. He even permits himself to say that "in other words, there is no English

[1] Lyndwood, Book iv. ed. 1679, pp. 271–7; references throughout are to this edition.

law of marriage." If it were allowable to describe anything that Maitland wrote as stupid, we should be tempted to call this stupid. It would be just as intelligent to say that there was no English law of Treason because, until the year 1352, not a word of it had appeared upon the secular statute-book. The English law of marriage was, with little or no qualification, the law of the Church Catholic, of which the English church was an integral part. It was not a whit the less English,—or French, or German,—church law because it had its full and sufficient expression in law-books promulgated under the authority of Popes. It is a prime example of those portions of 'the canon law of Rome' or 'the Jus Commune of the Church' which, being not opposed to the laws of England either in Church or State, was admitted as having full legal and binding authority in the English church courts. When we use the words 'or State,' they are true generally, though still with one most serious limitation, which might affect the inheritance of every acre of real property in England. An important rule of the Canon Law decreed that children born out of wedlock might be legitimated by the subsequent marriage of their parents. This rule the English temporal courts, from a very early period, refused to recognise; and when the English prelates,

at the Council of Merton in 1236, endeavoured, with all earnestness, to secure its acceptance by the temporal law, they were met by the historic declaration of the barons, "Nolumus leges Angliæ mutari." The Church adhered to her own rule, and applied it within her own sphere: with regard, for example, to the right of a person so subsequently legitimated to be admitted, without special dispensation, to Holy Orders. But from the early thirteenth century onwards the law of the Church was utterly disregarded as to all questions touching the inheritance of freehold which came within the cognisance of the temporal courts. In our present context the limitation is important because, when Stubbs declares that 'the canon law of Rome,' which in this case was that of England too, "was not held to be binding on the courts," he is not thinking solely of the ecclesiastical courts; and when he states that "attempts to force upon the Church and nation the complete canon law of the Middle Ages were always unsuccessful," he means exactly what he says, the '*complete*' Canon Law in reference to the Church *and* nation.[1]

We pass now to another important branch of jurisdiction, that which concerned the PRIVILEGIUM FORI. Here, and generally

[1] Maitland, pp. 52–6; Makower, *Constitutional History of the Church of England*, pp. 422–3.

throughout this chapter, we are with Maitland all the time. This PRIVILEGIUM FORI was the main battleground of the Constitutions of Clarendon and of the historic controversy between Becket and Henry II. "The English settlement was the result of a severe struggle in the thirteenth century." [1] It was a settlement very unsatisfactory to the thoroughgoing champions of 'the canon law of Rome,' of which, in this matter, that of England was a dutiful reflection. "The full extent of the immunity from secular justice that was claimed for the clergy," Maitland tells us, "was this: that no criminal charge was to be made and no 'personal' action brought against a clerk in any temporal court." As a matter of fact, the full extent of the concession admitted "was a 'benefit of clergy' in cases of felony. In our eyes this may seem a large, to the high churchmen of the thirteenth century it seemed an unduly small, concession. The list of felonies was brief, and if there was a charge of any minor offence, or if there was a civil action arising from contract or delict, the clerical defendant was to enjoy no privilege." In other words, 'the canon law of Rome' was set at nought. Of England too, for that matter; for at the synod of Lambeth in 1261 Archbishop Boniface promulgated a series of

[1] Maitland, p. 60.

Constitutions endeavouring to give effect to the papal law and demanding the PRIVILEGIUM FORI "in all its amplitude." Though they were the expression of his own law, the Pope, to whom an appeal was made on behalf of the Crown, hesitated to confirm them, and their legal validity was open to question. Their legal effect was *nil*. Lyndwood treats them as authentic law, though he acknowledges that, to all practical intents and purposes, they are a dead letter. His handling of them is very instructive, and we invite the reader's careful attention to it; for our object is not merely to show that Maitland has seriously mistaken the bearing of Lyndwood's book, but to offer, if it may be, a truer interpretation of it. In opening his gloss upon the first of these Constitutions with which he has occasion to deal, '*Contingit aliquando*,'[1] he says :—

"This is a statute of Archbishop Boniface, as are many others inserted in this book. For the most part the Constitutions of the said Boniface are penal, and concern the liberty of the Church and the violation of it. But these Constitutions are little observed, and therefore I pass over the glossing of them rather briefly. I propose, nevertheless, to show wherein they are in accord with the Jus Commune, and where they can be founded upon the Jus Commune."

[1] Lyndwood, p. 92.

The glosses which follow are in reality as elaborate as any in the 'Provinciale.' They place these Constitutions, admitted to be, for actual legal effect, no more than so much spoilt vellum, in proper relation to the complete law of the PRIVILEGIUM FORI as laid down in the papal law-books and their commentators. That law is an essential element in the Jus Commune, which must find a place in any scientific treatise on the Canon Law, and of which English prelates and canonists cannot afford to be ignorant. It is no part of Lyndwood's business to compromise the authority of that law, or to admit that it can be impugned *de jure*, whatever may be the case *de facto*. There is no knowing when, directly or indirectly, it, or any part of it, may not become of importance; there can be no telling at what moment an attempt may be made, on the part of the statute or common law of the realm, to curtail the narrow privilege actually conceded.[1] To Lyndwood the fact that the law is inoperative is neither affair nor fault of his. It is for the common lawyers to vindicate their own practice; all that they can expect of him is that he should not dispute it in terms. That his gloss involves an implicit

[1] As in 4 Henry VIII., c. 2; by which clerks in minor orders, accused of certain felonies, were brought within the jurisdiction of the secular courts. The measure aroused strong feeling among the clergy of the time (Maitland, pp. 87–9).

defiance of it is, to the common lawyers, of little moment; they are content enough with the explicit acknowledgment that the law on which he comments so fully and dutifully is, in fact, very much of a dead letter. It is simply a case of rival powers in honourable conflict. The representative of each is, and is expected to be, loyal to his own system. Each is perfectly alive to the facts, and to the difficulties of the other.

It may be assumed that in this matter of the Privilegium Fori the feeling of the clergy generally was against the common lawyers. The like assurance cannot be felt with regard to a third branch of jurisdiction, in its practical issues the most important of all. There was no more decisive prescription of the 'canon law of Rome' than that laid down in a decretal of Pope Alexander III. to the effect that "a cause of the law of patronage is so conjoined and connected with spiritual causes that it can be properly determined by the ecclesiastical judgment alone."[1] At an early period the law, as so laid down, had been respected in England. In the reign of Henry II., to whom the above decretal was addressed, a definitive change took place. By the Assize of Darrein Presentment the Jus Patronatus was annexed to the jurisdiction of the temporal courts. From this time the courts of the Crown

[1] c. 3, X. 2, 1.

took cognizance of all suits touching the right of patronage, and came down sharply upon any ecclesiastical court which attempted to interfere with them. Such attempts were never pressed; and it would seem that the Crown, in this gross invasion of the Roman Canon Law, met with but a very half-hearted opposition on the part of the clergy. Before long we find that the invasion, an accomplished fact which there is no gainsaying, is actually recognised in the ecclesiastical legislation of the Province. In the very Constitution of 1261, in which Archbishop Boniface asserts against the Crown the PRIVILEGIUM FORI in its full extent, he expressly disclaims any purpose of challenging the royal cognizance of suits of patronage.[1] If the Jus Patronatus had ever been a serious battleground, it had been definitely surrendered. No such surrender, no such acceptance or recognition of the fact, is chargeable against the Popes. The invasive rule of English law was, to the English Churchmen, in a measure protective; to the Popes, who were claiming, as of acknowledged right, "the plenary disposition of churches, parsonages, dignities, and other ecclesiastical benefices" in every quarter of the Church, it was restrictive purely. The middle of the fourteenth century was, for England at any rate, a very in-

[1] Lyndwood, p. 316.

opportune time for exercising such a 'plenary disposition' in derogation from the lawful rights of patrons. The Popes were Frenchmen, seated at Avignon, and under the influence of a foreign power with which England was prosecuting a victorious war. Their reservations of, and 'provisions' to, English benefices were made, notwithstanding, with a freedom which put the old common law writs to shame. And so, in 1350, we have ranging itself behind the writs the first great Statute of Provisors, followed, within three years, by the highly penal law of Præmunire, the whole being directed against those who dared, in collusion with the Pope, to act against the rule and jurisdiction of the English Common Law. All this Maitland, with that perversity of bias which disfigures his book, elects to describe as 'anti-ecclesiastical legislation.'[1] It is so only in the sense in which the recent Act requiring the provision of fireguards in nurseries is anti-infant legislation. Its declared purpose was to defend, against the Court of Rome, the common law rights of English patrons who were "prelates and other people of the Holy Church." Only in the case of an attack upon such rights was their exercise, for that turn, assumed by the Crown. Much better, and indeed full of rare insight, is another remark of Maitland's.

[1] Maitland, pp. 67, 69.

"There are some," he says (p. 63), "who will think that the true Magna Carta of the 'liberties of the English Church' is Henry's assertion that advowsons are utterly beyond the scope of the spiritual tribunals. This is the foundation of all subsequent legislation against 'provisors.'" Nothing could be more true; and the persistent failure to recognise it is a standing cause of incoherence in our history books. When hard things are said of the institution of patronage, two truths are commonly forgotten: first, that it is the abiding witness to the fact that the endowments of the Church are private in their origin;[1] secondly, that its history is the great history by which the English Church, throughout the Middle Ages, vindicated her nationality, and advanced from a position of ecclesiastical vassalage to one of freedom and independence. No wise man who knows anything of history will touch it without respect and caution.

[1] John of Ayton (ed. 1679, p. 135, ver. "Cum patrono") tells us, with references to the Doctors and the Decretum (Causa 16, quæst. 7, cap. 25, "Piæ mentis"), how, in the view of the Canon Law, the patron of an ecclesiastical benefice acquired his right: by having himself, or his predecessors, built, founded, or endowed the church.

"In hac materia Patronus dicitur qui jus vendicat præsentandi ad Beneficium Ecclesiasticum ex fundatione, dotatione, seu constructione sua vel Prædecessorum suorum."

The doctrine of the Law is compressed into the "versus":—

"Patronum faciunt Dos, Ædificatio, Fundus." It enshrines the immemorial fact that endowments arose, "at many times and in many manners," by the gift of private people to particular churches. No other doctrine has a candid word to say for itself.

What, then, do we learn in this connection? We see a momentous article of the Roman Canon Law contumeliously rejected by the English Crown, and the English Church, in her statutory legislation, accepting, recognising, we might even say tacitly approving, the action of the Crown. And we find our irreproachable canonist Lyndwood, in his comments upon this legislation, going further still. He knows, and frequently declares, that this English rule of law, by which suits of patronage are withdrawn from the cognizance of the spiritual tribunals, exists in the face of the Jus Commune. He cannot, however, deal with it as with the PRIVILEGIUM FORI, regarding it as a field of controversy which is still, to some extent, in debate. It is a closed question, and the Provincial Constitutions have admitted it as such. He not only, therefore, accepts the English rule *de facto*, but affects even to treat it as valid and to cloak it beneath the good canonical formula of Custom (pp. 217, 316). It was hardly in strictness a 'consuetudo præscripta,' for its origin was well within legal memory; but that is the best Lyndwood can make of it, and it is his acknowledged business to make the best. He may or may not have been a 'stark papalist,' as Maitland asserts; but certain it is that had he applied to this English

rule and the statutes which maintained it the language prevalent in the Roman Court, had he written them down as 'execrable,' 'abominable,' and what not, his seat in the Court of Arches would have become a very uncomfortable one. He doubtless regarded them, like most sensible Englishmen, as anti-papal certainly, but in no real sense "anti-ecclesiastical."

We have been bringing before the reader some salient facts, and disposing, incidentally, of the 'absolute identity' idea, which is not, in truth, a serious proposition, or one to which Maitland lends any countenance. The facts here given are as given by Maitland, though the setting is somewhat different. What we have to do is to examine the weight of the inference which Maitland founds upon them. He insists, all through his chapter on 'Church, State, and Decretals,' that so far as the Canon Law observed in England fell short of the integral Canon Law of Rome, it was due simply to the restrictive action of the State. The issue is an issue between Church and State. Is it really so? The facts, be it remembered, are not in dispute, but only their due interpretation and expression. What, in truth, do we mean by the mediæval State? Can we be quite certain that in applying to mediæval conditions these large abstractions of Church

and State, we are not verging perilously near anachronism? Are not these abstractions, as we now conceive them, the product of political events, the formulas of a political theory, which belong to later times? Has not this theory attained to ripeness and definition through the very drifting asunder of those allied powers which it was the genius and glory of the Middle Ages to have preserved in union? Are we not, in this free use of the formula of Church and State, applying to the conditions of a marriage the terms of separation and almost divorce? Is it not really the thought and language of Locke and Montesquieu? Would Lyndwood, or Wyclif, or even Marsilius of Padua have been at all at home with it? "We are concerned," says Maitland, "not with classes, but with institutions" (p. 74). He sees the Church as one institution, the State as another institution; each stands over-against the other. But, in the sovereign sense in which Maitland intends it, the Middle Ages knew of only one Institution, and it embraced the totality of mediæval life. It was the universe of Christian society, organised on Christian principles, informed by Christian ideals, governed by Christian laws, with specialised jurisdictions, with accordant, or casually discordant, powers, but without acknowledged cleavage or fissure, a sumptuous and splendid,

or slashed and ragged, but in either case an entire and seamless robe, "woven from the top throughout." The mediæval mind distinguished, not between Church and State, but between a spiritual and a temporal power consenting in the governance of one great Catholic community. It was a mind little prone to abstractions; it was occupied, concretely, with the forum sæculare, the forum ecclesiasticum, with Dominus Rex and Dominus Papa. These latter have their several places of magistracy within the Catholic Church, defined, our good Lyndwood will tell us, as "the multitude of the faithful, united in faith and charity."[1] The Pope is the Holy Father; the King is his most beloved son; but he is a grown-up son, with an estate of his own to administer. The traditions of the common household of faith are obliging alike upon Father and son; and the peace of the household can only be maintained by a common loyalty to those traditions.

So we should express, in our poor prose, the exalted ideal of mediæval life. But it is involved, at every moment and at every point, in human nature. Now suppose the Lord Pope, impelled by circumstances or tempted by opportunity, to advance and exert illimitable claims, and to call them Catholic and

[1] Lyndwood, p. 5, ver. "Ecclesia Christiana."

Apostolic. He will do so on the faith of certain fateful fabrications which will one day be exposed and ranked among the *pièces justificatives* of an ecclesiastical revolution, but which our age, having little critical apparatus or faculty, receives as God's simple truth and takes for binding on its conscience. Clearly, with their tradition of authority, authenticated, as from the earliest times, by the False Decretals, there will be no limit to such autocracy as the Popes may be pleased to assert. There is, however, a certain practical limit. The popular conscience and common sense is never much affected by theories of authority; and when the Holy Father's proceedings are such as to offend the common conscience and impeach the common interest, resistance, impossible in theory, will be energetic in fact. But it can only take one form and act through one channel. It must range itself behind the only power which can claim any original authority as against the Popes—the power of the Crown. According to the high papal theory, even the Crown, or, in simplicity, the Lord King, has hardly *locus standi*; for Christ's Vicar bears the Two Swords, and even the temporal sword is held in delegation from him. Which theory is scouted by the persons most concerned, the temporal princes, who are satisfied that it has

no ground either in history or policy. The true Catholic sentiment of the age did accord to the Lord King a recognised position. He was the acknowledged patron and defender of Holy Church within his realm. The oil of his anointing meant that, and much more. His subjects—prelates, clerks, laymen—were people of Holy Church, every soul of them. They were Catholic people with rights and duties; and it was the prince's office, in the last resort, to compel the performance of those duties and, not less, to respect and defend those rights. He may have, on occasion, to defend them against the Pope, and to stand, especially, against developments of the proposition that, as against the will of the Popes, the Catholic people have no rights at all. His action as patron of Holy Church will be governed by the ordinary moral conditions of political action. He must carry the Catholic people with him. If he forgets his kingly duty altogether and stands for a tyranny over Church and realm, then you will have Runnymede and Magna Carta, with its opening pledge "that the English Church is to be Free, and to have her rights intact and her liberties uninjured." If, in his rage for secular order and justice, he trenches upon the immunities of the clergy, but offends, in doing so, the popular conscience by blundering into un-

premeditated murder, then you will have the shrine of Becket and the renunciation of Avranches. And if again he finds that, while his English armies are overrunning France, the creatures of a French Pope are overrunning England, invading the rights of English Churchmen, intruding unlawfully into English benefices, and contemning the process of the English common law, then you will have the Statutes of Provisors and Præmunire, with their careful and dreadful system of penalties and their formal defiance of the Roman Court. We may call these statutes the work of the State; but such language is unreal. They were the work of the Lord King, in his character of patron and defender of Anglicana Ecclesia, the English Church. They were enacted in a legislature in which her bishops had seats[1] as Lords of Parliament—a legislature representing, as the Convocations of the clergy did not, the whole Catholic people. That people, generally faithful to the Pope, required some practical protection against papal absolutism; but, with the ideas of truth and duty then prevailing, they had no possible foothold for resistance except in Parliament and behind the Crown. Ecclesia Catholica, Ecclesia Anglicana, Regnum Angliæ—

[1] They were usually careful not to take them when this sort of legislation was afoot.

a man had a duty to do and a conscience to keep in relation to all three; and had he been luckier and lazier than he was, he might have welcomed our cut-and-dried formula of Church and State to make the moral problem easier. The problem was conditioned by the early development of its third term, the Realm of England. Long before her neighbours of the Continent, England attained to unity and organised nationhood; and this reacted, necessarily, upon the consciousness of her Church. The Primate of all England was really 'Papa alterius orbis' in something more than a geographical sense. When Maitland says (p. 114) that "too often we speak of 'the Church of England,' and forget that there was no ecclesiastically organised body that answered to that name," he is stating a half-truth, and much the lesser half. When men spoke, as they habitually did, of the Ecclesia Anglicana, they were not uttering wind. They were thinking, not of the two provinces, but of the one National Church, which had vindicated its liberties against a recreant king, and was ready to do the like against a recreant pope. Over all our history, in Church and Realm, have blown the free breezes of the Channel. Neither in the department of law nor any other was the English Church a mere obsequious satellite of the Roman.

We may conclude with an illuminating page of Maitland, in illustration of much that we have been saying. He is thinking especially of the time of Henry II.; but the conditions he portrays are more or less constant throughout the Middle Ages.

"It is very possible that at times many or most of the clerks in England wished well in their heart of hearts to certain anti-ecclesiastical efforts of the temporal power, and rejoiced at the issue of prohibitions. But more than this can be said of that early age, the twelfth century, which drew the principal lines that were to separate the two jurisdictions. It was a time when the king's court was full of bishops and archdeacons, and we may well believe that it was with their right good will that the advowson was handed over to the temporal power, and thus withdrawn from the sphere of ecclesiastical law, Roman influence, and begging letters that were almost 'provisions.' Some of these prelates were in all likelihood far more at home when they were hearing assizes as *justiciarii domini regis* than when they were sitting as *judices ordinarii*, and they were already leaving the canon law to their schooled officials. For a compromise which bartered the advowson against the testament, there was much to be said. Even at a later time, when ordained clerks had

forsaken the bench, they still peopled the chancery. Those writs of prohibition against which the clergy protested in their assemblies must often have been drawn by ordained clerks, settled by 'masters' who were doctors of the canon law holding abundant prebends, and sealed with a seal whose custodian was a bishop. There never was wanting a supply of persons duly qualified and somewhat eager to serve the state and hold the benefices of the church. Many a mediæval bishop must have wished that, besides having two capacities, he had been furnished with two souls, unless, indeed, the soul of one of his subordinates would serve as an *anima damnanda*. Parties and partisans there have always been. If Grosseteste was a clergyman, so also was Bracton; they held diametrically opposite opinions about the *privilegium fori*. We, however, are concerned, not with classes, but with institutions. We must not attribute to the state the acts of this or that baron; we must not attribute to the church the opinions of this or that bishop. It is of the constitutions that were promulgated in ecclesiastical councils, and the rules that were enforced by ecclesiastical courts, that we make our question" (pp. 73–4).

Precisely. We have been looking at these Constitutions. We find that some of them recognise and accept a certain 'custom of

the realm of England ' which is directly opposed to the Roman Canon Law ; the ecclesiastical courts are ruled accordingly, and make no claim to exercise a jurisdiction belonging to them of right by the Jus Commune. And let it not be supposed that Lyndwood, in speaking of a ' consuetudo Regni Angliæ,' is thinking merely of a rule of English temporal law. The word ' regnum ' is good ecclesiastical language, and denotes a portion of the Church, a province or group of provinces, united, in temporals, under a single ruler. It is a sound church word, enshrining the principle of nationalism, and connoting the whole national Church, without regard to its delimitation into provinces. Maitland insists that this custom of the Realm of England has its source in the restrictive action of the temporal power, or, as he elects to call it, the State. Formally this is true ; what it means actually we have been endeavouring to show.

IV. THE 'JUS COMMUNE' AND THE CHURCH LAW OF ENGLAND

Before going further, it will be well to recall Stubbs' position, remembering always that his special point of view is not that of the canonist, but of the constitutional historian, concerned with jurisdictions as exercised *de facto*. He tells us, negatively, that "attempts to force on the church and nation the complete canon law of the middle ages were always unsuccessful"; that "the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts"; that a knowledge of it "was the scientific equipment of the ecclesiastical jurist, but the texts were not authoritative." He tells us, positively, that it was an acknowledged element of ecclesiastical law, and of legal effect where not inconsonant with the law of the land; and that, "except in the rare case of collision with national law, the general legislation of Christendom, whether by pope or council, was accepted as a matter of course."

We have been dealing, in the previous chapter, with certain important matters in which 'the canon law of Rome' was in collision with national law as maintained and administered by the secular courts. We have seen that, as regards these matters, it was rejected by the secular courts and its operation extinguished, consequently, in the courts Christian. All this Maitland is at the pains to affirm, insisting, quite truly, that the responsibility lay with the secular power. We have now to proceed a step further, and to meet Maitland on his own chosen ground. We have to ask whether there are matters, and matters of importance, in which the papal law was in collision with the national church law as embodied in the Constitutions of the English provinces, and in which, without any interference of the secular power, the English Canon Law prevailed against the papal. If there are such matters, then Stubbs' view of the papal law-books, as a Corpus Juris "of great authority," but not as "codes of statutes" "binding on the courts," will be absolutely borne out. Such matters may cover but a small area in the whole field of ecclesiastical law. Stubbs himself speaks of them as 'rare'; but rare though they be, they are of the utmost importance, for they must have been daily brought into question, and there was not a

parson or a parish or a parishioner in England that was not affected by them. Every day they must have involved decisions in which the English Canon Law, and not the papal, was "held to be binding on the courts."

Now Maitland is himself constrained to admit that such cases do exist, and that two, at any rate, of them are 'really important.' His admission strikes us as cursory, niggardly, and incomplete. He makes it as some slight qualification of his general thesis. He has too loose a grip of Stubbs' real teaching to see that it involves the destruction of that thesis, so far as it is a serious polemic against Stubbs. And, of course, as the reader will observe throughout, it is Stubbs' real teaching, not any random and intemperate gloss upon it, that we are here concerned to vindicate.

We shall review the evidence, and then attach to it, as an instructive pendant, the twenty-four lines of letterpress which it occupies in Maitland's book.

We shall deal first with quite a small matter; it has, however, a bearing upon the case, and it affords a striking illustration of Maitland's method. He tells us (p. 10) that Lyndwood cites the papal 'Extravagants' as law. "For example, the amount of money that should be offered to a visitor by way of 'procuration' is fixed by the *Vas electionis* of Benedict XII.

This instance may serve to illustrate the difficulties besetting any theory which would ascribe 'great authority' but no binding power to papal ordinances. The *Vas electionis* is an imperative document; it enacts a tariff. The pope expressly legislates for England among other countries. He says that an English prelate on the occasion of a visitation is not to receive more than a certain sum of money. Such a statute you can obey, or you can ignore; no third course is open to you. If you deny that it binds you, then you allow it no 'great authority'; you allow it no authority whatever. For Lyndwood it is law. He admits that in England a custom has grown up which fixes the amount that an archidiaconal visitor is to receive; but in all cases that are not within this custom the *Vas electionis* should prevail."

Now this is all very well; but there could not be a better way of obscuring the issue and muffling the plain truth. Lyndwood is commenting on certain Provincial Constitutions of Archbishops Stephen Langton and John Stratford. They have nothing to do with 'prelates' or 'visitors' in general. They are concerned expressly with the dues and duties of *Archdeacons*. The disciplinary visitation of parishes was, and is, the special and principal function of archdeacons. It involved ex-

penses, and these were met by a charge levied upon each parish visited and termed a procuration. The Constitutions, while laying down the conditions under which the procuration is payable, do not state the amount of the procuration. They refer to it simply as the customary amount.[1] Lyndwood tells us what the amount is.[2] He tells us that it is *not* the amount fixed by the *Vas electionis*, notwithstanding that the *Vas electionis* assumes to fix it as well for English as for other archdeacons. It is fixed, in spite of the *Vas electionis*, by "the common use in England." Why, then, does Lyndwood introduce the *Vas electionis* at all? His mention of it is purely academic.[3] His work, though written round the Provincial Constitutions, is designed as a compendium and directory of the whole law. The student will be aware that duties of visitation are exercised by others besides archdeacons: prelates, for example, bishops, and archbishops. He will also be aware, if he is a parish priest or has read his John of Ayton,[4] that the bishops of this kingdom do not commonly exact procurations, as they do not visit the churches in detail, but carry out their visitations in special

[1] Lyndwood, p. 224, ver. "Solet solvi."
[2] *Ibid.*; also p. 220, ver. "Evectionis numerum."
[3] P. 221, ver. "Personaliter."
[4] Ayton, p. 114, ver. "Nisi cum eidem," ed. 1679.

assemblies of clergy and people. But if our prelates did what they do not do, visiting particular churches and exacting procurations; and if, being new to the business, they were doubtful what to charge; and if the reader, having leisure for irrelevancies, desires some light on their unlikely difficulty, he will find it, supposing he cares to look, in an elaborate decretal of Benedict XII.—the *Vas electionis* to wit. It has no bearing upon the matter in hand, but Lyndwood has warned us[1] that he is not writing mainly or principally for the learned, and that he will avail himself of opportunities of conveying instruction even when it may not bear strictly upon the matter in hand. He here erects a little wayside fingerpost directing the curious to the *Vas electionis*. He is careful to make clear that in the case of the only people to whom it could apply in England — archdeacons namely[2] — it is overridden by a piece of English customary law, and by an English constitution recognising the custom. He mentions it at all because it represents, albeit inoperatively, a body of legislation which is "always regarded as of great authority in

[1] P. 95, ver. "Commenta," see below, p. 155.

[2] Stratford's Constitution mentions 'alii ordinarii' besides archdeacons, but by these Lyndwood understands ordinaries of equal or lesser rank. These lesser people may be rural deans, but in England we do not hear of them receiving procurations (p. 224).

England," even when it "was not held to be binding on the courts." For, be it ever understood, the English Church is never contemptuous of the papal law, even when she shows an effective preference for her own.

But mark how Maitland presents the matter. He treats Lyndwood's glancing references to the *Vas electionis* as solemn statements of the law. In a grave disquisition as to the effect of the decretal he huddles up the one plain fact that for England it has merely a curious interest, being overridden by English law in the one case to which it could apply. The decretal "is an imperative document; it enacts a tariff. The Pope expressly legislates for England among other countries. He says that an English prelate on the occasion of a visitation is not to receive more than a certain sum of money. Such a statute you can obey, or you can ignore." Let us see how it was obeyed in the only case in which it could operate. The Archdeacon of Maidstone visits the Church of Otham, with a maximum legal retinue of six. He is a pleasant soul, and has recently been pondering the *Vas electionis*. When the time comes to receive his procuration, he says to the rector: "You are aware, no doubt, that the amount has recently been revised at Rome. I have the decretal in my saddlebag, if you would care to see it. I'm

afraid I must ask you, on this occasion, for fifty silver pieces of Tours, or rather more than four good golden florins, pure, of lawful weight, and of the mint of Florence." "Venerable sir," replies the rector, whose circumstances make such pleasantries unseasonable, "you cannot be serious. My pockets are innocent of this silver of Tours, and I know nothing of the mint of Florence. If you are willing to accept the legal procuration, due to you by the common use in England, well and good. It will be eighteenpence for yourself and your horse, and twelvepence each for the members of your company—seven and sixpence in all. If you ask for more, you will not get it, with all respect to our Holy Father, Pope Benedict the Twelfth." And the Archdeacon, who knows that he will not get it, waives his demand, well content with his little joke and with the customary procuration.

Now what is it that leads Maitland to find so much in this empty Vessel of Election? Simply his anxiety to prove that the papal law was operative in England. But who denies that it was operative? Who denies that, translated into the law of Parliament, great parts of it are operative still? What we deny is that it was operative as against good English law and custom to the contrary.

What we affirm is that the English Church produced a body of law which, though 'imperfect,' as Stubbs allows, and needing to be supplemented from the Corpus Juris, possessed, in the shape which it assumed in Lyndwood's digest, a kind and degree of legal authority which the Corpus Juris, as a whole, had not. And the foregoing little matter of seven and sixpence is an unimportant case in point. There are others of greater moment.

The most conspicuous feature of popular religion in mediæval England was the cult of St. Thomas of Canterbury. It has left behind it a jewel of literature; and we can still follow the Pilgrims' Way, worn by the tread of unnumbered multitudes who flocked to the shrine of the murdered Becket. In the Calendars of the English Church two feast-days are dedicated to St. Thomas the Martyr. In a Constitution of Archbishop Islep in 1362, designed to check the shirking of work on minor festivals, the Days of St. Thomas are numbered, along with Christmas, Easter, Whitsun Day and others, among festivals of chief observance. Yet Lyndwood points out[1] that 'the Roman canon law,' in Canons and Decretals, has not a word to say of them. On the other hand, it dedicates the chief of them to St. Sylvester, whose festival, in

[1] P. 102, ver. "Thomæ Martyris."

England, is neither observed nor enjoined. Lyndwood does not think it necessary to tell us that, had an English parish priest of 'Romanising tendencies' attempted to displace St. Thomas by St. Sylvester, he would not only have got to loggerheads with his parishioners, but with his bishop and his bishop's courts as well.

We turn to the law of ritual, no unimportant matter, as we have reason to know in these latter days. The Middle Ages knew nothing of Acts of Uniformity; but they possessed a far-reaching rule of uniformity, and it is laid down in Gratian's Decretum. By this article of 'the Roman canon law,' the ritual usage of a province was to be governed by that of the metropolitan Church. North of Trent the rule was operative; the Use of York was the standard for the whole northern province.[1] It was so in fact and on its merits, not, we imagine, out of any special deference to the law of the Decretum. In the province of Canterbury, on the other hand, the law was given, not by the primatial Church, but by the suffragan Church of Salisbury; the great Use of Sarum came to permeate the province, and where, as at Hereford, it did not obtain, the Use observed was that of Hereford. In the

[1] Wordsworth and Littlehales, *The Old Service Books of the English Church*, p. 8.

ritual order Canterbury itself was a satellite of Sarum. In London, not long before Lyndwood wrote, the old Use of St. Paul had given place to that of Sarum (1415), and about the same time the governing authority of the Sarum Use is recognised in the statutory legislation of the province. It was the morrow of Agincourt, when the English arms had surely been upheld by the intercessions of the old Saxon saint, John of Beverley, the feast of whose 'translation' fell upon that renowned day. And so Archbishop Chichele, at the instance of the devout and grateful warrior-king, issues a Constitution providing for the ampler commemoration of St. John of Beverley, with offices according to the Sarum Use. Lyndwood[1] calls attention to the law of the Decretum, but justifies the Archbishop's ordinance on the ground of 'long custom,' 'ex longa consuetudine.' He even goes further—his patriotic feelings being evidently engaged—and says that the law of the Decretum may be regarded as having been abrogated by the English constitution, especially as it recognises a usage which is practically universal throughout the province. He points out, moreover, that the Bishop of Sarum has the place of precentor in the episcopal college, and that, by ancient observance and

[1] P. 104, ver. "Usum Sarum Ecclesiæ."

custom, it is his duty, when the Archbishop celebrates divine service in the presence of his suffragans, to direct the choir in the divine offices.[1]

And so we see how the better part of England said its prayers regardless of 'the Roman canon law.' But we must pass to more mundane matters.

Englishmen have never been spoilers of churches and baiters of clergy. Two things may be noted about their old-time attitude towards their spiritual pastors and masters. They insisted that their parsons should be good Englishmen, and given this, they were perfectly satisfied to treat them well. Their clergy, by the customary and statutory church law of England, were relieved of a weighty burden laid upon them, and accorded a weighty privilege denied them, by 'the Roman canon law.' Every parish had its church, and every church, by law, had to be maintained in repair. The costs were heavy and

[1] Opponitur contra hoc, 12. di. de his., ubi ordinatur quod officium Divinum servari debet et dici per totam Provinciam secundum modum et usum Metropolitanæ Ecclesiæ. Dic quod hoc quod allegatur pro contrario verum est a parte Juris Communis; illud tamen quod hic dicitur de usu Sarum tenendo ortum habet ex longa consuetudine, quæ, cum sit rationabilis, tenenda est. Vel dic quod ad solutionem contrarii sufficit sic fore hic statutum, maxime cum quasi tota Provincia hunc usum sequatur. Episcopus namque Sarum in Collegio Episcoporum est Præcentor, et temporibus quibus Archiepiscopus Cantuariensis solenniter celebrat Divina præsente Collegio Episcoporum, Chorum in Divinis officiis regere debet de observantia et consuetudine antiqua (*ibid.*).

recurrent. Upon whom did they fall? The law of the Decretum was decisive upon the matter. The entire charge was laid upon the rector. Not so said, and says, the law of England. The responsibility of the rector was limited to the chancel; the upkeep of the nave is an obligation of the parishioners.[1] This was a custom of national church law; but Lyndwood tells us of local custom which goes further, and requires the curate to find no more than two wax candles, or not even that in many churches in the city of London.[2] The reader will observe that in all these matters we are not dealing with trivial incidents of usage or procedure, but with large prescriptions of law which bear upon the everyday life of the Church. Our next point concerns a whole department of jurisdiction.

When the great lawyer-prelates, who worked to make England under Henry II., withdrew from the spiritual courts and annexed to the secular courts the whole jurisdiction in causes of patronage, it was with no design of injuring the Church or encroaching upon her real liberties. They were simply occupying a defensive outwork of nationality in the interest of Church and realm alike. The King's

[1] Ayton, p. 113, ver. "Cancellos etiam ecclesiæ." Lyndwood, p. 53, "Reparatione"; p. 250, "Defectus ecclesiæ"; p. 253, "Navis ecclesiæ."

[2] Lyndwood, p. 253, "Ad quos pertinent."

courts assumed the protection of ecclesiastical endowments against misfeasance within and aggression without; and all in professed vindication of the rights of patrons who were presumed originally to have given them. This far-reaching assumption, which cut clean across the papal law and still more across the papal policy, was accepted by the English Church herself with singular complaisance. It was, there is little doubt, the occasion of the silent composition, the characteristically mediæval 'deal,' by which, in lieu of the province of law abstracted, the whole jurisdiction in testamentary causes was made over by the secular to the ecclesiastical courts. Its presence there was a mere enormity from the point of view of the papal Canon Law, which made no claim to it nor had rules to apply to it. Its rules had to be drawn from the Roman Civil Law, although, by the civil law, the jurisdiction was vested in the lay judge.[1] As to the origin of the English practice Lyndwood is not very clear; but both he and the Provincial Constitutions are agreed that it came about through the old-time grant of the King and magnates of the realm of England, in the times of what king he cannot discover.[2] The ordinance, whenever it was, must be presumed, he tells

[1] Lyndwood, p. 170, "Insinuationem"; p. 174, "Approbatis"; p. 176, "Ecclesiasticarum libertatum."

[2] P. 263, "Consensu Regio"; "Ab olim."

us, to have been sought or approved by the Church herself. The Church, we may be sure, made no difficulty; on the other hand, she made the best of a very good bargain; for she lost nothing solid in the jurisdiction abstracted from her, and she gained, in the testamentary jurisdiction conceded to her, a source of great influence and no small profit. But in accepting the bargain, and in recognising the facts in her formal legislation, she made herself party, positively and negatively, to an immense breach in the Roman Canon Law. For what did it mean? We have seen already what one part of it meant (pp. 58–62); and now for the other part. Just as churches were constantly needing repair, so churchmen were constantly dying and needing to have their wills proved; and every will made in England had to be "proved, insinuated, and approved" before a bishop's Official, who, according to the Roman Canon Law, had no business with it at all. When a will affected property in different dioceses, it had to be taken for probate before the metropolitan court. The Prerogative Court of Canterbury was wholly occupied with testamentary business; and its president, at the time of writing, was Lyndwood himself. This cognisance of testamentary causes the English Church numbers among her cherished 'liberties.' Those who hinder

the effect of testaments are "violators and disturbers of ecclesiastical liberties," and are to be visited, according to Constitutions of Archbishops Boniface and Stratford, with the greater excommunication.[1] The discussion of these and suchlike 'liberties' draws from Lyndwood some interesting expressions. The Commentators, Innocent, Johannes Andreas, and the rest, had distinguished between 'ecclesiastical liberty' as it concerned the Church Universal and as it concerned 'aliqua Ecclesia singularis.' The former could be defended by the penalty of excommunication; the latter could not. An ill-disposed person, attempting to hinder the effect of a will and to defeat the process of Lyndwood's court, is sentenced to excommunication; but, relying upon 'the Roman canon law,' he protests against the sentence, declaring that the liberties he is invading are no more than those of an 'ecclesia singularis'—the mere Church of Canterbury to wit. Lyndwood, however, will have none of it. These liberties, as known to the law, are not those of Canterbury or York, but of the whole Ecclesia Anglicana.[2] It is neither an

[1] Lyndwood, p. 176.

[2] Cf. Peckham, *Registrum*, i. 250: Where the Archbishop, writing to Edward I. on behalf of Anian, Bishop of St. Asaph, who is being molested by the King's Justices, reminds him that "Quidam justiciarii nec anathematis lati ultionem poterunt evadere, qui particulares ecclesias more insolito suis juribus spoliare contendunt, quam, ut novit vestra dominatio, omnes incurrunt libertatum universalis Anglicanæ ecclesiæ turbatores" (1281 A.D.).

'ecclesia singularis' nor a vain abstraction; it is a solid whole "quæ in sui totalitate quandam Universitatem importat respectu suiipsius; et sic ejus libertas potest dici Universalis, licet in aliquibus differat a libertate Ecclesiæ generaliter Universalis."[1] Its peculiar liberties—such, for example, as are involved in the existence of the Prerogative Court—are a special extension of the 'libertas Ecclesiæ Universalis,' and may therefore be protected by the same sanctions.[2] And if Maitland or anybody else had observed to Lyndwood, "Too often we speak of 'the church of England,' and forget that there was no ecclesiastically organised body that answered to that name. No tie of an ecclesiastical or spiritual kind bound the bishop of Chichester to the bishop of Carlisle, except that which bound them both to French and Spanish bishops,"[3] the reply would certainly have been, "True, true, most true; the Church of England, notwithstanding, is a great fact, *quædam Universitas*, and it is idle to try to argue it away. She exists; she has an identity of her own, laws and liberties of her own; she has the means of ensuring respect for them; and nobody knows it better than our lord the Pope."

And here we may state, in a sentence or two,

[1] P. 266, ver. "Ecclesiæ Anglicanæ."
[2] P. 89, ver. "Ecclesiasticæ libertatis."
[3] Maitland, p. 114.

the one great solid fact of which no cavil can dispose. Apart from the common discipline *pro salute animæ*, ecclesiastical jurisdiction in mediæval England was concerned, positively or negatively, with three large departments of law: testamentary causes, matrimonial causes, and causes touching the right of patronage. *In one only of these*—that dealing with matrimonial causes—was the cognizance accordant with the Jus Commune. In causes of patronage the English Church waived a jurisdiction to which she had full right, and, in testamentary causes, she assumed a jurisdiction to which she had no right—by 'the canon law of Rome.'

But the tale is not yet quite told. We have not yet done with the Prerogative Court and its spiritual congeners throughout the kingdom. We have to consider certain rules which they administered. If we find that these courts, whose very existence is an exception to the Roman Canon Law, are administering certain English rules—important rules—in actual contradiction of it, we may venture to claim the case against Maitland as fairly well established. The rules in question are two. Maitland ignores the more important of them, and plainly knows nothing of it. He adverts obscurely to the other, and calls it unimportant. That was certainly not the view of Lyndwood.

These rules are referred to in a provincial constitution of Archbishop Edmund Rich.[1] The constitution consists of thirty-five words; Maitland disposes of it in seven lines; Lyndwood's gloss upon it runs to nearly four closely printed folio pages, containing eight columns, each of eighty-five lines. And Lyndwood knew what he was doing. He was finding a place, in his Corpus Juris Canonici Anglicanum, for two rules of purely English church law, either or both of which he might have any day to administer in his judicial capacity. Maitland dismisses the whole matter as follows :—

" It is not an important rule that after Lady Day a rector has power to dispose of the tithes which will become due at the next harvest; but, as this English rule conflicts with the common law, Lyndwood has to argue that it is not unreasonable, to cite the doctors and allege an analogous rule that is to be found in the feudal law of Lombardy." [2] Now what does Maitland mean? He would naturally be taken to mean " has power to dispose of the forthcoming tithes by sale." Lyndwood speaks of disposing of them by sale; the constitution forbids any rector to dispose of them by sale before Lady Day. This, however, is no custom, English or other, but a

[1] 1236, Lyndwood, pp. 23–6.
[2] Maitland, pp. 41–2.

positive precept of the law. This law of Edmund Rich says :

" Let no Rector presume to sell the tithes of his church, which are not yet gathered, before the Annunciation of the Blessed Virgin Mary : from which day the fruits ought to go by custom to the payment of the said Rectors' legacies or debts, if they shall have died before the gathering of such fruits."[1] The constitution limits the contracting powers of living rectors ; and recites, by way of reason, a custom of law which has reference to the goods of dead ones. The custom is contrary to the Jus Commune. According to the Jus Commune, if a rector die with any 'fruits' ungathered, they will belong to his successor, or should be disposed of otherwise for the good of the church. The opposing custom of the English Church, which reckons them as part of the deceased's estate, if his decease took place between Lady Day and Michaelmas, has a parallel in the feudal law of Lombardy : by which, if a vassal died, leaving no son, before the beginning of March, his fruits were claimed by the lord : if he died after that date, they passed to his own heirs or

[1] " Nullus Rector decimas Ecclesiæ suæ nondum perceptas vendere præsumat ante Annuntiationem Beatæ Mariæ Virginis, a quo die fructus de consuetudine cedere debent ad ipsorum Rectorum, si ante fructuum perceptionem decesserint, legata vel debita persolvenda."

executors. The peculiar law in Lombardy and in England relates to what happens to a man's goods after death. Can Maitland mean then that after Lady Day a rector has power to dispose of his tithes by will? Plainly not; for the limitation of such a power to the period after Lady Day was neither law nor custom. Moreover the custom, as recited in this constitution, has no necessary reference either to tithes or testators; and this Lyndwood is at pains to tell us. The word used is 'fruits,' which includes the entire income of a benefice, whether derived from tithe, glebe, or what not; and the custom applies in favour of intestates, to the extent, at any rate, of the payment of their debts.[1] The straightforward explanation of Maitland's statement we take to be as follows: He comes to Lyndwood's 'elementary law-book' much as other 'beginners.'[2] He must have formed, like ourselves, a high opinion of the industrious contemporary who prepared Lyndwood's admirable index. Desiring to learn what Lyndwood can tell him as to the bearing of the legal principle of Custom upon his general thesis, he turns to a whole 'title,' 'De Consuetudine,' and, under that title, to a particular gloss, 'de consuetudine,' to which the index refers him

[1] Lyndwood, p. 24, ver. "Fructus"; p. 26, "Legata."
[2] See Chapter vi., pp. 154–57.

three times over. It occurs in Lyndwood's commentary on this constitution of Edmund Rich. The gloss is lengthy; but the beginning of it is sufficient to suggest to him that Edmund is ordaining something, confirming some custom, which is contrary to the Jus Commune, but which has a parallel in the feudal law of Lombardy. He may have read the constitution; but if so, too hastily to take it in. More probably he was content with a glance at the initial rubric, which reads: "Rector Ecclesiæ decimas nondum perceptas ante annuntiationem Divæ Virginis non vendet"; and proceeded to write, "It is not an important rule that after Lady Day a rector has power to dispose of the tithes which will become due at the next harvest." All this is very disconcerting; and we should hesitate to allege it, were it not that Maitland's ignorance of other glosses upon this same constitution is too plain to be mistaken. Had he held up the page to which he refers between finger and thumb, his thumb would have been pointing to the feudal law of Lombardy, and his finger would have been resting on Lyndwood's gloss on the word 'legata,' legacies; and this gloss would have introduced him to a much more far-reaching custom of English church law, in opposition to the Jus Commune, which his argument would have required him

to take into account. He ignores it absolutely throughout his work.

So far we have been made acquainted with a peculiar rule of English church law, important to all beneficed clergymen in the kingdom, an uncertain half of whom might expect, in the providence of God, to depart this life between Lady Day and Michaelmas. According to the 'canon law of Rome,' whenever an acting rector or vicar died, the fruits of his benefice which were then in his hands, not to speak of those accruing at the subsequent Michaelmas, passed to his successor; or, if there were a prolonged delay in the appointment of the successor, they were to be expended by the bishop for the good of the church. The successor, or the bishop, however, were responsible for the satisfaction of the debts of the deceased and other charges properly incumbent upon him: as, for example, the cost of repairing the fabric of the church;—not, as in English church law, of the chancel only.[1] By English Canon Law, on the other hand, whenever a bishop or rector or vicar or any one, whether acting or not, deriving a personal income from an ecclesiastical benefice, died, the fruits of his benefice then surviving, *bona intuitu ecclesiæ acquisita*, constituted a disposable estate; and if his death took

[1] C. 1, in Sexto, i. 9, Præsenti. vv. "Reservari: debitis."

place after Lady Day, the fruits accruing at the ensuing Michaelmas were included as part of his estate and were available for the payment of his debts *or legacies*.

'Or legacies,' legata. Lyndwood has frequently to refer us, in other places in the 'Provinciale,' to his gloss on the word 'legata.' He devotes to it nearly a folio page. He has to do so; for he cannot mention these 'legata' without coming into conflict with 'the papal statute-books.' The 'canon law of Rome' had dealt with the legatary powers of beneficed clergymen, as regards their "bona per ecclesiam acquisita." What Maitland would call the 'statute-law' on the subject is laid down in a rescript of Alexander III. included in the Book of Decretals.[1] The doctrine of this authoritative text was simple and decisive. It recognised no such powers. Such goods devolved to the successor in the benefice, and the deceased could leave no will regarding them. But this text was not 'authoritative' in England. The customary law of the English Church, which permits a beneficed clerk to bequeath even his "bona Ecclesiæ contemplatione acquisita," is recognised, implicitly and explicitly, in her statutory legislation; and this legislation, 'provincial' though it be, is valid as against

[1] C. 12, Extra. iii. 26, "Relatum."

the decretal. For example, we have a constitution of Archbishop Stratford which ordains "that Bishops and other inferior ecclesiastical judges of our province of Canterbury in no wise intermeddle, under any pretext, with the goods of beneficed clerks,—who, by the known custom of the realm of England, have power to make wills,—or with the goods of any other testators, except in the cases expressly permitted; but that they allow the executors of such wills to make free disposition of them."[1] Now how does Lyndwood discuss this English rule, in regard to the matter of its validity? He does not discuss it at all. He opens his gloss as follows:—

"Legata. From this it is apparent that a beneficed clerk can dispose by will of the fruits of his church; and this is true by custom even of fruits not yet gathered, as here, (in this constitution of Edmund Rich). Whence, *a fortiori*, the custom is valid that he may dispose by will of those gathered. It is otherwise, however, by the Jus Commune. But inasmuch as there is a custom practically general throughout England, that a beneficed clerk may dispose by will of the moveable goods acquired from the fruits of the church actually gathered, and sometimes though not

[1] Lyndwood, p. 179.

gathered, as here, without any distinction as to whether the beneficed clerk had himself administration or not: that question, as to whether a beneficed clerk may lawfully make a will concerning things acquired in regard of his Church, I pass over here as idle to discuss." [1] If you want to see it argued, you will find it all in Hostiensis, or the Cardinal, or Johannes Andreas; but the whole discussion is otiose as regards the English Church, which possesses, and practises, a law of her own.

Here then are two rules of English church law. They concern spiritual persons and ecclesiastical property. Actually or potentially they touch every clergyman in England, except such as are members of religious orders, in a very tender part. They come before courts which can claim no cognisance of them by the 'canon law of Rome.' The most important of these is the Prerogative Court of Canterbury, of which Lyndwood himself is president. Constantly he will have before

[1] Ex hoc apparet quod Beneficiatus testari potest de fructibus ecclesiæ, et hoc verum de consuetudine etiam de fructibus nondum perceptis, ut hic. Unde a fortiori valet consuetudo ut possit testari de perceptis; secus tamen est de Jure Communi. Verum quia est consuetudo per Angliam quodammodo generalis, ut videlicet Beneficiatus testetur de mobilibus acquisitis ex fructibus ecclesiæ saltem perceptis, et quandoque non perceptis ut hic, nulla habita distinctione utrum Beneficiatus ipse habuerit administrationem, sive non; omitto hic illam materiam, scil. an Beneficiatus possit licite testari de rebus acquisitis intuitu ecclesiæ, tractare tanquam superfluam" (p.26).

him the will of the beneficed clergyman, involving goods "intuitu ecclesiæ acquisita." If it happens to be summer-time, he will have to ask whether the deceased has died since Lady Day, and whether, in that case, the value of the fruits accruing at Michaelmas has been duly included as part of his estate. And, being satisfied on that head, he will grant probate, in accordance with the well-known canon law of England, and in courteous disregard of 'the papal statute-books.'

Now suppose Lyndwood, after a day spent in business of this kind, sitting up at night with the 'Provinciale,' at work upon the law of probate. "I wish," he says, as he stretches his limbs, "I wish to goodness I could dispose of all this on lines of 'stark papalism,' and go to bed." But that would be shirking. He is constructing a treatise on English church law, considered in itself and in its proper relations with the Jus Commune, of which, so far as it goes, it is a national expression. That law includes some important peculiarities on which the doctors of the Curia, Hostiensis, Cardinalis, Johannes Andreas and the rest, afford no light, and the 'supreme lawgiver' less than none, for they contradict his authoritative decretals. These far-reaching peculiarities of English Canon Law have to be, not justified—omitto illam materiam tractare tanquam super-

fluam,—but stated, explained, limited, and accommodated to the law in general so far as that is practicable without compromising their validity. They are the law which governs the practice of the church courts on the matters in concern; but they are exceptions from, and must be equitably related to, an august Corpus Juris which an English canonist must always regard as "of great authority" even while engaged in showing that particular prescriptions of it are not "binding on the courts," and are, in fact, "of no force at all." And therefore a single word, 'legata,' may demand a folio of annotation, even though it carry the commentator into the small hours.

What, let us ask, has Maitland to say of the matters which have been occupying us throughout this chapter? His handling of them is summary in the extreme, far too summary to be anything like fair. Here is the passage, and let the reader judge:

"In the details of divine service there was, indeed, a considerable room for variety. A long-continued custom, says Lyndwood, sanctions 'the use' of Salisbury throughout the province of Canterbury, though according to the Jus Commune 'the use' of the metropolitan church should be the model. But the possibility of disputes about ritual did not fill any

large space in the mind of the canonist, who had many other things to think about, and outside the ritualistic sphere we read of little law that has its base in distinctively English custom. It is not an important rule that after Lady Day a rector has power to dispose of the tithes which will become due at the next harvest; but, as this English rule conflicts with the common law, Lyndwood has to argue that it is not unreasonable, to cite the doctors and allege an analogous rule that is to be found in the feudal law of Lombardy. The two really important English customs of which we hear are that which, diverging from the Jus Commune, imposes on the parishioners, and not on the rector, the burden of maintaining the nave of the parish church, and that which assigns to the spiritual courts an exclusive jurisdiction in testamentary causes, and thus gives the canonist more than he can ask for in the name of his Jus Commune" (pp. 41–2).

That is all.

With the best will in the world, it would be difficult to accept the above as a judicial presentation of the evidence. Neither can it be regarded justly as an ordinary example of special pleading. The explanation is simpler. Maitland is so sure of his case, so satisfied that all the substantial evidence is on his side, that he

deems himself justified in dealing in the most casual fashion with such facts as appear to bear against it. Turning over Lyndwood's pages, he finds himself suddenly a pioneer, a discoverer. Like Cortes, upon a peak in Darien, beholding the Pacific, he surveys the omnipresence of the papal law, the omnipotence of the papal jurisdiction. In their legal relations, he sees the Papacy as a great flag galleon, with the Ecclesia Anglicana a mere cockboat half hidden beneath her quarter. To pretend that the cockboat carries an armament which, if her crew turns mutinous, will enable her to dispute the seas with the galleon, is absurd. It is absurd. The whole cockboat notion is absurd. The English Church, in a legal sense, is no cockboat; neither is she a privateer, irresponsible and possibly anarchic; she is a unit of the fleet, recognising the common naval law, but strong enough, if need be, to hold her own singly, and commanded by men who have a very perspicacious blind eye for use upon occasion. She asserts no general right to pick and choose among the decretals, or to accept or reject, at her mere will and pleasure, the 'canon law of Rome.' The words of Stubbs and his brother Commissioners, which provide the theme of Maitland's book, imply no such claim. She was neither dependent absolutely, nor independent.

Her relations with the Papacy might be fairly expressed by the formula of free dependence. She possessed a freedom conditioned by duty and conscience, and postulating loyalty to the papal power as the very Vicariate of Christ; she acknowledged a dependence admitting of consideration and consent, and postulating loyalty to her own national character and traditions. To claim for her an actual legal independence is a historical heresy, and Maitland has a right to attack it wherever found. Where he is wholly wrong is in pretending to find it in anything that Stubbs has written, either in the Ecclesiastical Courts Commission Report or elsewhere. Where he is wholly wrong is in fabricating, in opposition to it, a heresy at least as baseless, the idea that the English Church, before the Reformation, was bound hand and foot in the fetters of the papal law. Even as regards Churchmen in the then usual sense of ecclesiastics, 'viri ecclesiastici,' subject though they were, by express gradations of 'obedience,' to the authority of the Holy See, it was not so. As regards Churchmen in the fuller modern sense which includes the laity, the 'multitudo fidelium,' it was emphatically not so. If it had been so, the political relations between England and the Papacy would not have turned, so often as they did, upon sometimes frantic, and always

futile, "attempts to force on the church and nation the complete " Canon Law of Rome.

" What we find " in the ' Provinciale ' " is a stark papalism, which leaves little enough room for local custom, and absolutely no room for any liberties of the Anglican church which can be upheld against the law-giving power of the pope." [1] It is a characteristic dictum, downright and dull, the merest bludgeon-play of argument. What help is it to describe as ' local ' a body of custom which is evidently national, and which figures in the argument because it is national ? What is more plain, moreover, than that this body of national customary church law will itself constitute, in great measure, the liberties which the Anglican Church will uphold against the law-giving power of the Pope ? Only she will not need to ' uphold ' them; she will only have to establish their existence. For the Roman Canon Law itself recognises the principle of prescription ; if a custom of law can boast a history beyond legal memory, or even of continuous observance for more than forty years, it holds good against the ' jus positivum,' it stands against the statute. A custom of law, to avail against the statute, must be ' præscripta,' and it must be ' rationabilis.' [2]

[1] Maitland, p. 47–8.

[2] C. 11. Extra. 1, 4, ver. " Rationabilis ; legitime sit præscripta."

Difficulty, when it arose, arose about the 'rationabilis.' The reasonableness of a customary rule of law might be variously judged. To the Popes it was eminently reasonable that they should be able to reward their agents or indulge their creatures by preferment to dignities and benefices in England, as in other more complaisant realms. They had to depend, like the temporal princes, upon the most primitive devices of finance; and their 'provisions,' had they been made with moderate regard for private rights and national susceptibilities, would scarcely have been challenged. But when made wholesale, as an incident in their claim to universal jurisdiction, *mero motu*, and of their sovereign will; when 'provisors' were aliens, and 'provisions,' anyhow, a nuisance and scandal, the occasion of recurrent outcry amongst aggrieved clergy and exploited laity, the case was different. Then Englishmen were provoked to appeal to a certain "consuetudo regni Angliæ," which was 'præscripta,' and which nothing could persuade them was not 'rationabilis': for it was their one defence against the jeopardy of their rights and the jobbery of their souls. This much-boding custom gave the cognizance of causes of patronage to the courts of the Crown, which would not suffer their suitors to be molested or their decrees to be defeated.

Such a custom, from the point of view of the Roman Curia, was "contra nervum Ecclesiasticæ disciplinæ sive libertatem" (*ibid.*), 'irrationabilis' therefore, and not to be accepted on any terms. If Englishmen are to maintain it, they must take positive steps; it is one of those exceptional 'liberties' which the Anglican Church must actively "uphold against the law-giving power of the pope." But her Convocations will lie very low in the matter, for many good reasons, public and private. There is no need for them to move, when the fateful custom can be made good, with less friction and much more seemliness and effect, by the courts of the Crown, or, if it comes to the worst, by the High Court of Parliament. It is true that the Statutes of Provisors and Præmunire were Acts of Parliament and not of Convocation; but it is strange that the distinction should appear practical and important to an intellect of any keenness and power. They were passed by representative bodies of Anglican Churchmen in defence of one of the few "liberties of the Anglican Church" which needed to be 'upheld' by such a drastic process.

One thing may be said in conclusion, and it cannot be said too earnestly. All phrases, on whichever side of the argument employed,

that presuppose an essential antagonism and collision between the national and the papal Canon Law, are really inadmissible. We have been compelled to use such phrases, because we have to do with a controversialist who deals in them freely; but, in themselves, they have no effect but to darken counsel. To attain to any candid and sympathetic view of the Middle Ages, they must be banished absolutely. Controversy and collision there was in plenty; but to the mind of the time it presented itself always as a luckless aberration, to be set right wherever possible. A dread of pressing quarrels to extremes was common to all statesmen secular and ecclesiastical, national and papal. England, Church and nation, did not renounce the papal authority because its exercise was often harassing and vexatious; the Popes did not lay the kingdom under an interdict because they were powerless to get rid of the laws of Præmunire. Battles, hot battles, drawn battles, were things of every day; but behind them all, deeper than them all, was the passion for unity, the striving for harmony, the honest acknowledgment of allegiance. It is to the credit of the age that unity and harmony were so largely maintained, not by the trim and stupid method of the utter subordination of the national churches to the one great central jurisdiction,

but upon terms consistent with honour and liberty, with loyalty, on the one hand, to the Regnum Angliæ, its Church and King, and, on the other, to the noble earthly Regnum Dei whose reverend metropolis was Rome.

V. THE 'INFERIOR' LEGISLATOR

We are now in a position to form some estimate of the character and effect of English canonical legislation, as embodied in Lyndwood's 'Provinciale.' It was part and parcel of the Jus Commune of the Church, a free and generally faithful expression of it. That Jus Commune was not created by the publication, in 1234, of the first of the "three papal statute-books," so called.[1] It was the common and ancient heritage of the Church; its materials had been accumulating for more than a thousand years, and had been massed together already in the Decretum of Gratian. The Decretum is exhibited by the canonists, in constant citation, as the living basis of the Corpus Juris; in origin, however, it was "mere private work, one among rival text-books, and to the last it never received any solemn sanction."[2] It included masses of papal regulation, authentic and otherwise; its authority is presumed in the subsequent collections of decretals; and it, with the Books of Decretals, con-

[1] Maitland, p. 4.

[2] *Ibid.* p. 3.

stituted the operative Jus Commune as practised and taught, by papal authority, in the courts and universities. This was the Authorised Version of the Canon Law; and can be spoken of, less as to its authority than as to its authorisation, as 'the canon law of Rome.' English archbishops were many of them learned in that law, and all were bound to respect it and observe it. Their Provincial Constitutions, however, are not mere excerpts from the decretals, nor do they profess to rest upon the authority of the Popes, except in so far as all authority was presumed to emanate from the Popes. They were enacted by the authority of the archbishops themselves in their Provincial Councils. On the ground which they cover, they coincide generally with the Jus Commune. In some instances, none the less, they recognise and confirm important prescriptions of customary law which are opposed to the Jus Commune, and yet are valid and operative in spite of it. In one instance they even go the length of accepting as of custom a rule which the Canon Law of Rome would refuse to recognise as defensible even upon custom. Including its deviations from the Jus Commune, this provincial legislation, together with that promulgated, with the express 'approval'[1] of

[1] John of Ayton, ed. 1679, p. 79.

National Councils, by their presiding legates Otho and Othobon, constitutes a body of national church law, possessing substantive and explicit authority in England such as the Corpus Juris, as a whole, has not. It is "held to be binding on the courts" in a sense in which the integral Corpus Juris, for all its 'great authority,' is not.

Maitland's view is very different. To him the importance of this English legislation, to which Lyndwood thought it worth while to devote ten years of labour, appears inconsiderable, if not contemptible. "The series of provincial constitutions on which" Lyndwood "comments covers a period of two centuries. But we have here no great bulk of law. It is a small thing to put beside the Sext, which represents some sixty years of papal activity. When, as Lyndwood does, we have cut away from the constitutions their preambles or harangues, what is left is by no means a weighty mass. Be it granted that the importance of a law is not to be measured by its length; but, if we turn from quantity to quality, the more carefully we examine these constitutions, the lower will be our estimate of their importance. They are essentially 'bye-laws' in the modern sense of that term. In Lyndwood's eyes some of them do nothing

at all, or very little; they are but the provincial publication of law that was already binding on all the faithful. This publication of existing rules, if humble, is still useful work. . . . We should be exceedingly unjust to Peckham and Winchelsea if we set their constitutions beside the statutes of Edward I. It was not for them to be trenchant or drastic; it was not for them to be original. They could not imitate Quia Emptores or the Statute of Mortmain. They were 'inferior' legislators, and this at a time when their superiors were legislating profusely. That many of these provincial constitutions did good, that they were the outcome of a zealous desire to correct faults and remove abuses, we may be very ready to admit; but, when we look at them through the eyes of the English canonist, we see that they contain little that is new, and are only a brief appendix to the common law of the universal church" (pp. 35–7). All of which leads up to the illuminating statement that "there is no English law of marriage."

What is it that leads Maitland to these mean impressions? Not the facts, as we have been endeavouring to show; and that by reference to facts which Maitland himself, for the most part, affirms or admits. Is it then a faulty interpretation of the facts? Such a thing is

quite possible, even for a man of genius and learning, when his learning, in a newly ventured field, has not yet mellowed into knowledge. Historic truth is not one of the kingdoms which the violent can take by force. Ecclesiastical history is a territory to itself, too great to be subjugated by brilliant raiding. There is such a thing as 'believing rightly,' as we say in the Quicunque vult. A man may tear the heart out of a book and yet fail to lay a touch upon its soul. How comes Maitland to regard this English church law as no contemporary would have regarded it, to see in the 'Provinciale,' and imagine Lyndwood to see in the 'Provinciale,' mere 'bye-laws,' some of them doing 'nothing at all, or very little,' no more than a 'publication of existing rules,' humble but useful? He hesitates, in his goodness, to place the Constitutions of Peckham and Winchelsey beside the statutes of Edward I.; yet nothing is more certain than that the subjects of Edward I. would have had no such pitying hesitation. For them the statutes of the Primates in Convocation and of the Sovereign in Parliament possessed, in their respective spheres, an equal moral and legal authority. In their minds the Provincial Constitutions were not bye-laws, but the law; of them, as the law, they habitually thought; to them they habitually

appealed.[1] It was, to them, the law of Holy Church, as their own Church had had occasion to enact it. As for 'the papal statute-books,' they were important to the well-to-do suitor who could afford himself the luxury of an appeal to Rome; they were important to the advocate and judge official, who might be called upon any day to consider issues upon which no light was to be had except in the texts, and still more the glosses, of the Corpus Juris. But to the modest suitor who had to content himself with the lower air of litigation, to the peaceable person who had the sense or luck to keep clear of litigation, to the ordinary man who had his part to play in the daily life and work of the Church, the Books of Decretals made very little matter; only distantly and indirectly did they come within his ken. Church law for him was the church law of England. If he was a prelate of any degree, or even a humble beneficed clerk, this aspect of the matter was continually being impressed upon him. He was continually being 'premonished' to attend, in person or by representation, at Lambeth or old St. Paul's, there to consult with the Archbishop about the state

[1] The student can verify this by looking through Wilkins, *Concilia*, iii. 246–646, which contain the records of the fifteenth century. The law is continually referred to, and the law referred to is almost always that laid down in English constitutions.

of the Church and to take part in enacting statutes for its amendment. Had he informed his metropolitan that there was already "a statute-book deriving its force from the pope who published it, and who, being pope, was competent to ordain binding statutes for the catholic church and every part thereof" including England, and that it was too much to expect him to come up from Wales or Cornwall or the wolds of Lincolnshire in order to take part in such humble, if useful, work as the "publication of existing rules," possibly doing "nothing at all or very little," his metropolitan would have been very much surprised. He would have intimated to him sharply that the work in hand amounted to much more than publication; that it was not at all humble, not merely useful, but highly responsible and altogether necessary. Of course no one talked such rubbish, and for a reason which everybody understood. The Jus Commune, even as embodied in 'papal statute-books,' was not operative *ipso facto*; it could do pretty well everything but execute itself. A Pope might think, "L'État c'est Moi"; but it was not true in fact or in history, and self-respecting princes, hand in glove with self-respecting prelates, were quite decided that it should not become true. Practically and constitutionally, the only means by which the

law of the decretals could become expressly operative in England was, not its publication merely, but its express enactment in an English national or provincial Council. Its successive enactment, subject to modifications imposed by established national law, secular and ecclesiastical, constitutes in time a body of national Canon Law which Englishmen recognise and observe as their own. It is sharply distinguished from the papal law, which, for all its 'great authority' in general, includes elements to which they vehemently object. It grows, from decade to decade, with the vigour of an inherent life. In its growth and due observance is involved the welfare of the national Church. It calls for the best pains of the legislator, the best powers of the interpreter, the best obedience of those English faithful to whom it is addressed, and whose lives it, and it alone, is felt to govern. For them it is the Law.

But how of Maitland's very different view? His powers as an investigator have seldom been rivalled; and we should be the last to underrate them, even though we believe his treatment of these matters to be in no small measure wilful, unhelpful, and unreal. The clue to his attitude is to be found, if we mistake not, in those pages (pp. 19–31) in which he adduces Lyndwood's treatment of certain

Constitutions of Archbishops Peckham and Stratford. In these pages, written with gay confidence, he justifies, by Lyndwood's authority, the only element which is original in his thesis, the thorough disparagement of the national Canon Law. They are the foundation of such remarks as that " it was not for " such prelates as Peckham and Winchelsey " to be trenchant or drastic; it was not for them to be original. . . . They were ' inferior ' legislators, and this at a time when their superiors were legislating profusely." It will be necessary to look a little more closely at these Constitutions, and at Lyndwood's treatment of them. His comment takes the form of criticism. He questions the validity of these Constitutions. He points out that they are opposed to the Jus Commune: they claim no support in established custom. Possibly they are little operative. Yet Lyndwood, though he exercised a large liberty of selection, includes them in his collection, just as he included Constitutions of Archbishop Boniface which were inoperative for other reasons; their omission might give rise to awkward remark. Their inclusion, however, need not worry anybody; for when, for example, Peckham's faulty Constitution about pluralities was drafted, the sound law had been already laid down by a Pope in a General

Council; it possessed, therefore, a paramount authority; and no attention need be paid to a legal solecism by which an English archbishop, after all an 'inferior' legislator, assumes to override it.

So Lyndwood; but his statement does not exhaust the matter, though Maitland treats it as if it did. We must pursue it further. It will lead us further in our inquiry as to the meaning and purpose of Lyndwood's book. It will throw a further light on the working relations of the papal and the national Canon Law. It will show, we imagine, that whoever in the Middle Ages shared Maitland's mean view as to the legislative powers of English archbishops, it was certainly not those archbishops themselves.

We have first to deal with Archbishop Peckham's Constitution of 1279, directed against illegal pluralism. We must crave the reader's indulgence in entering into this with fullness. It is Maitland's 'locus classicus.' In it is to be found, if we mistake not, the germ and gist of his whole treatise. It is in dealing with this and other legal lapses of Peckham that his tone, as to the legislative powers of an English archbishop, touches its loftiest levels of confident contempt. His humour becomes ebullient in the exhibition of Peckham as an 'inferior' legislator, whose

solemn acts are of no force whatever when in conflict with the paramount papal law. Maitland's authority is Lyndwood, the merest surface of Lyndwood. Now Lyndwood treats this matter as one of abstract law; and from that point of view his treatment is intelligible and sound. Maitland, however, is writing history, and adduces Lyndwood as a witness to history. And we see reason to believe that as a matter of history Lyndwood, in this connection, is no more than a blind leader of the blind; and that, though Lyndwood himself keeps clear of the ditch, his learned follower is landed in it completely.

Pluralism was the corrupt practice of accumulating in a single hand, without sufficient dispensation, two or more ecclesiastical benefices involving the cure of souls. In the thirteenth century it was a growing abuse which the law attempted to prevent and to restrain. The chapter of law with which we are concerned begins with a decree of Innocent III. in the Fourth Lateran Council in 1215. By this decree any clerk who, having one benefice with cure of souls, received a second such benefice, was *ipso jure* deprived of the former.[1] The effect of this decree was to prevent pluralism altogether, so far as the law could do it. A

[1] C. 28, Extra. iii. 5, "De multa": "Præsenti decreto statuimus ut quicunque receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat, eo sit ipso jure privatus."

possible exception was admitted in the case of men of birth and learning, in favour of whom the Apostolic See reserved, to itself alone, the power to grant dispensations to hold such benefices in plurality. The effect of this was to abrogate the hitherto legal right of simple bishops to grant such dispensations at their discretion. It remained a question with the canonists whether the papal reservation did not apply strictly to men of birth and learning, and whether the bishops could not still, as heretofore, grant dispensations to others 'ob utilitatem Ecclesiæ.' The 'supreme lawgiver,' however, was decided that no dispensation was valid unless it proceeded from himself.[1]

And now for Peckham's luckless Constitution. It is in two parts; the earlier, with which we are now concerned, deals with the existing state of things, and with the undispensed pluralist as Peckham found him flourishing in his province when he became Archbishop in 1279. Maitland's account of it is as follows:—

"Against 'pluralities' there had been severe legislation. A decree of the fourth Lateran Council (1215) had declared that in certain cases if a man having one benefice obtained

[1] C. 28, Extra. iii. 5, ver. "Per Sedem Apostolicam"; Lyndwood, p. 137, ver. "Dispensatione."

another, he was *ipso jure* deprived of the first. In 1268 a constitution of the legate Ottobon decreed that the second institution of such a pluralist should be void *ipso jure*. Then in 1279 Archbishop Peckham dealt with this matter. He remarked that the decree of the Lateran Council deprived the pluralist of the former of his two benefices, and that the legatine constitution deprived him of the latter, and then spoke thus: 'We, being unwilling to heap rigour on rigour, and considering the spirit of these two constitutions, neither of which deprives the pluralist of both benefices, and mixing mercy (*misericordiam*) with rigour, do permit (*permittimus*) that the pluralist may retain the latter benefice.' Now this was not a very bold essay in legislation, and the archbishop expressly professed to be giving effect to the spirit of the existing law. Nevertheless, Lyndwood held that Peckham's constitution was for the more part void. Here is his gloss on the word *misericordiam* :—

"'Note that this mercy should rather be called injustice. For the mercy shown by the author of this decree is expressly contrary to a decree of the second Council of Lyons contained in the Sext, which neither the archbishop nor anyone lower than the pope can repeal or alter.'

"Then to the word *permittimus* Lyndwood sets this gloss :—

"'This permission can do nothing to prevent the law of the superior (*i.e.* the pope) from prevailing; unless, perhaps, you say that it is valid so far as regards the person who gives the permission (*i.e.* the archbishop), so that he cannot impugn the second title of the pluralist; for, as regards the person to whom the permission is given, we must receive rather what the law says about the matter than what is said by the person who gives, but has no power to give, the permission; for such a permission, which is really no better than a mere tolerance, cannot excuse him who receives it from being bound by the law of the superior legislator.'" [1]

Maitland leaves these glosses to speak for themselves. They are, to our mind, a little unilluminating. They sufficed for Lyndwood's legal student; but they convey nothing to the modern reader except the one fact which Maitland wants him to know, the fact that a statute of an English Archbishop is held by Lyndwood to be "for the more part void" because it is in conflict with the papal law, the law of the superior. But there is a story behind these glosses. Lyndwood does not tell the story; he does not know it, and, anyhow, he is not concerned with it, his business being with law and not history. Maitland

[1] Maitland, pp. 20–1.

does not tell the story, partly because he knows less of it even than Lyndwood, partly because his present purpose is to exhibit the Archbishop as a sort of legislative scarecrow, and for that purpose any odd text from Lyndwood will suffice. If Maitland had known it, his account of Peckham's constitution could not have been the perfect tissue of inaccuracy that it is. To illustrate this, we shall give it again; and, in a parallel column, the same sentences as they ought to be if they are to represent the perfectly lucid Latin. The reader will see, on reference to the footnote, which of the two columns is the more faithful to the original.

"A decree of the fourth Lateran Council (1215) had declared that in certain cases if a man having one benefice obtained another, he was *ipso jure* deprived of the first. In 1268 a constitution of the legate Ottobon decreed that the second institution of such a pluralist should be void *ipso jure*. Then in 1279 Archbishop Peckham dealt with this matter. He remarked that the decree of the Lateran Council deprived the pluralist of the former of his two benefices, and that the legatine constitution deprived him of the latter, and then spoke thus: 'We, being unwilling to heap rigour on rigour, and considering the

"A decree of the fourth Lateran Council (1215) had declared that in certain cases if a man having one benefice obtained another, he was *ipso jure* deprived of the FORMER. In 1268 a constitution of the legate Ottobon decreed that the LAST institution of ANY ACTUAL PLURALIST should be void *ipso jure*. Then in 1279 Archbishop Peckham dealt with this matter. He remarked that the decree of the Lateran Council deprived the pluralist of ALL HIS FORMER BENEFICES, and that the legatine constitution deprived him of THE LAST, and then spoke thus: 'We, being unwilling to heap rigour on

spirit of these two constitutions, neither of which deprives the pluralist of both benefices, and mixing mercy with rigour, do permit that the pluralist may retain the latter benefice.' "

rigour, and considering the spirit of these two constitutions, neither of which deprives the pluralist of ALL benefices, and mixing mercy with rigour, do permit that the pluralist may retain the LAST benefice.' "[1]

Now here we see Maitland, no fumbling undergraduate, but a scholar of renown, steadily reading singulars for plurals; and that in a statute which concerns pluralities. In other words, he is committing, not once or twice, the only blunder possible. It is a blunder which argues a thorough want of comprehension, and from which, had he cared less to score off Peckham than to understand his work, he might have been guarded by Lyndwood's own glosses. For Lyndwood is perfectly aware

[1] " Decernimus, juxta formam Generalis Concilii, omnia beneficia curam animarum habentia, quæ de facto obtinent hi qui dispensationem Apostolicam super pluralitate beneficiorum hujusmodi non habent, per beneficii receptionem quod ultimo receperunt ipso jure vacare. Et licet juxta rigorem Constitutionis Domini Othoboni sic recipiens plura beneficia ultimo ipso jure sit privatus—cum secundum eandem decernatur institutio irrita ipso jure,—Præcavere tamen volentes ne rigorem videamur coacervare rigori, mentemque Constitutionum tam Concilii Generalis quam etiam Domini Othoboni clarius advertentes—quarum neutra et præobtentis et ultimo simul privat (cum Concilium Generale solum auferat præobtenta, ultimum tamen reservat; Constitutio vero Othoboni institutionem in ultimo beneficio decernat irritam ipso jure, præobtento (Wilkins, *Concilia*, ii. p. 34, " præobtentis ") tamen ipso jure non privat: Nos, misericordiam cum rigore miscentes (Wilkins, add, " non tam misericorditer quam etiam prudenter "), permittimus ut is qui plura beneficia curam animarum habentia absque dispensatione Apostolica fuerit assecutus, ultimo beneficio sic obtento, juxta Generalis Concilii tenorem (Wilkins, add, " de nostra speciali gratia ") sitcon tentus." Lyndwood, pp. 135–6," Audistis "; see Appendix A. iv.

that Peckham's constitution is an odd jumble or juggle of singulars and plurals; he is careful to point out that 'last' does not mean 'second,' and that the student must not understand of one and two what Othobon says of two and more.[1] Lyndwood apparently puts it all down to muddleheadedness on Peckham's part;[2] and from his own point of view, which is that of abstract law, an archbishop who could produce a constitution 'expressly contrary' to a decretal contained in the Sext, was doubtless capable of anything. It must be remembered, however, that Lyndwood is writing one hundred and fifty years after the event, that there were no handy reference libraries, that Peckham can have been to Lyndwood little more than a name, an old archbishop who had been a considerable theologian, a zealous reformer, but an unexpert practitioner in the domain of law. Had Lyndwood been a historian, and had occasion to burrow in the Registers at Lambeth, he might have come upon facts which would have given him a livelier respect for Peckham's intelligence, even in the domain of law. Let us try to disinter John Peckham.

Peckham was a Sussex man. He was educated at Lewes Priory and at the University

[1] Lyndwood, pp. 135–6, vv. "Ultimo: institutio: irritam: præobtento."

[2] *Ibid.* ver. "Rigori."

of Paris, where he studied under the Seraphic Doctor, St. Bonaventura, afterwards his chief as Minister General of the Franciscan Order. He became Reader in Divinity at Oxford, and subsequently lectured at Paris on the Sentences of Peter Lombard. He was a prolific writer. While at Oxford he joined the Franciscans, in the great days of the Order; and in time became Provincial Minister in England. As a monk he was known for his extreme austerities. Devoted to his rule, he travelled on foot across Europe, in his first year of office as Provincial, in order to attend a general Chapter at Padua. The fame of his sanctity and learning led to his summons to Rome. The reigning Pope, Nicholas III., was himself a Franciscan; and he and John Peckham were looked upon as the two luminaries of the Order, Nicholas the sun, Peckham the moon. At Rome he became Lector Sacri Palatii, "the first theological lecturer in the newly founded schools in the papal palace. His lectures were attended by large audiences, including not a few bishops and cardinals. It is stated that when he passed through the school to take his place in the professorial chair, the whole of his audience rose and uncovered. After he was appointed archbishop, however, the cardinals refused to show him this respect any longer, saying

that previously they had honoured the theologian, to whom they acknowledged themselves inferior, but now it might be thought they honoured the archbishop, to whom they were superior."[1] Such was the man, a friar and scholar of European fame, who was created, by papal provision, Archbishop of Canterbury upon the retirement of Robert Kilwardby in 1278.

Only four years before, there had been held at Lyons, under Pope Gregory X., a great General Council, which had stirred the heart of all Christendom. Among the decrees of this Council was one directed against illegal pluralism. By this decree pluralists who failed to exhibit proper dispensations within a given period, incurred the forfeiture of all their benefices.[2] It was promulgated in the decretal "Ordinarii locorum." It was intended to make a clean sweep of illegal pluralism as then existing. It had been provoked, the gloss upon the Corpus tells us, by the abounding greed of Germans and Spaniards, "quia plus in talibus excedebant." When Peckham left Rome to enter upon his work as Primate of all England, it was with the urgent personal injunction of the Pope to stamp out pluralism within

[1] *Registrum Epistolarum Fratris Johannis Peckham, Archiepiscopi Cantuariensis*; ed. C. T. Martin, Preface, pp. lvii.–lxii. Rolls Ser.

[2] C. 3, in Sexto, i. 16; see Appendix A. iii.

his province.[1] From all we know of Peckham, there can be no doubt of the enthusiasm and energy with which he set himself to fulfil this mission. In his first year as Archbishop (1279), he assembled his Provincial Council at Reading, intending that its first act shall be an act of war against pluralism.

Now if Maitland's view of the operation of the Canon Law is right, if it represents the world of actual life, if it is more than an ill-judged attempt to transfer to actual life the formal commonplaces of legal theory; if Pope Gregory x. is in fact an omnicompetent sovereign, who has power "to ordain binding statutes for the catholic church and every part thereof";[2] if the English Church is, in the eyes of its own ordinaries, merely "a dependent fragment, whose laws" are "imposed upon it from without" (p. 44); if, for her, "there is to be no picking and choosing," since she knows that "the decretals are laws" (p. 18) binding, within two months of their publication (p. 17), *ipso facto*; if this whole notion of 'ipsofactodom,' so to speak, is not a mere glaive of lath, belonging, not to history, but to the mock-solemn harlequinade of history; —then Peckham's task at Reading will be the simplest thing possible. He will simply promulgate the "Ordinarii locorum." If he

[1] Wilkins, *Concilia*, ii. 33. [2] Maitland, p. 3.

shares Maitland's view (p. 32) that his legislative powers, like the 'superior' legislative powers of the Pope, inhere in his own person, he will not be embarrassed by the attitude of his suffragans. He will promulgate the decretal, will they, nill they. But what happens? Nothing of this kind happens, for we are living in a real world. Let us see what happens.

Among Peckham's suffragans is Robert Burnell, Bishop of Bath and Wells, and Chancellor of England. Not so long ago Burnell's own nomination to the Primacy, though strongly supported by his powerful master, had been set aside by the Pope, doubtless for good reason. He was, perhaps, too little of a priest, too much of the statesman-prelate. Let us suppose Burnell present at Reading; he has forgotten his soreness; he is only anxious to help his rival to make a good start. He finds him full of zeal against pluralism, full of the "Ordinarii locorum." Burnell tells him, with the concurrence of his brother bishops, that the decretal will not do. It is a new broom, and the attempt to use it will mean dust and disturbance, with things, at the end, no better than they were. It goes too far. It is in effect a penal statute; it puts the pluralist out into the road. Apart from that, it is not altogether convincing. Some of us are not

wholly satisfied that the dispensing power resides solely in the Holy See, and there are famous doctors who agree with us. In any case, the Pope seems to speak with two voices. He says that pluralism is so intolerable an abuse that it must be extirpated utterly. He says that pluralism is so intolerable an abuse that it can only be allowed to flourish under his own extensive patronage. Consider what "Ordinarii locorum" will mean in practice. There is Anthony Bek, for example, the king's most trusty secretary.[1] He has not troubled about a papal dispensation; and he holds five benefices in your Grace's Province, and goodness knows how many more in York.[2] Are we going to turn Anthony into the street? And what of our Lord Edward, who is fond of Anthony? If we imagine for a moment that the king will allow it, we shall be very much mistaken. No. If reform is necessary, and no doubt it is, let us go about it on practical lines. Your Grace will be well advised to turn "Ordinarii locorum" with its face to the wall. Let us be content simply with getting rid of pluralism. What we want is a remedial, not a penal, measure; and we will gladly support your Grace on these lines.

Now Reading is a long way from Rome, and

[1] Consecrated Bishop of Durham, January 9, 1284. Stubbs, *Registrum Sacrum Anglicanum*.

[2] Peckham, *Registrum*, i. pp. 138, 245.

Burnell, or whoever it was that put the case before Peckham, knew what he was talking about. He spoke for his brother prelates, more than one of whom, probably, in his humbler days, had been as unblushing an offender as Anthony Bek. Peckham himself will be the first archbishop to refuse confirmation to a bishop-elect on the ground that he is a guilty pluralist.[1] And at the moment Peckham sees that Pope Gregory's decretal may be all that Maitland says it is, but that it is not practical politics. What does he do therefore? He ignores the decretal, and falls back upon the law of his province. The law had been laid down, in council, by the papal legate Othobon so recently as 1268. The constitution of Othobon decreed that if in future a pluralist was presented to a further benefice and could not show sufficient dispensations, he was not to be admitted, and, if actually instituted, the institution was to be null.[2] This was held to mean that the 'last' institution of an undispensed pluralist was void *ipso jure*. This is the law of a 'superior' legislator, a papal legate no less; but it is obviously of no use to Peckham. In the eleven years which had elapsed since Othobon, the enterprising pluralist had not

[1] Peckham, *Registrum*, i. 228.

[2] John of Ayton, ed. 1679, p. 129, cap. "Christianæ"; see Appendix A. ii.

been idle. Anthony Bek may well forfeit his 'last' benefice, and yet continue very comfortable on the other four. And Peckham's design, the 'propositum' which he ardently shares with Pope Nicholas, is to rid his province of pluralism altogether. Othobon, therefore, must be ushered politely to one side. Peckham's solution is ingenious and effective; it satisfies his conscience, and it satisfies his suffragans; it carries out the Pope's wishes, but by grievous disregard of the papal law. What Peckham does is to place his own interpretation, which had doubtless become the current interpretation, upon the old decree of the Lateran Council of 1215. He reads it to mean that all former benefices held *de facto* by the undispensed pluralist are vacated *ipso jure* by the reception of the last. The last institution will hold good, and the chastened ex-pluralist will retain the wherewithal to live.

"Nos, misericordiam cum rigore miscentes, non tam misericorditer quam etiam prudenter permittimus ut is, qui plura beneficia curam animarum habentia sine dispensatione apostolica fuerit assecutus, ultimum sic obtentum retineat, et eodem juxta Concilii Generalis tenorem de nostra speciali gratia sit contentus."[1]

These are the enacting words, so far as they concern us. They involve, Peckham knows

[1] Wilkins, *Concilia*, ii. 34; cf. Lyndwood, p. 136.

as well as Lyndwood, an illegal concession—an 'injustitia,' which Maitland will render 'injustice'—legalised, nevertheless, within his province. It mingles mercy with rigour. It is made out of pity and prudence, which being uppermost who shall say? It is made 'of our special grace.' It is designed to meet a difficult situation in the only way possible. It contravenes the law of Rome in order to carry out the will of Rome; and so the Holy Father will assuredly understand it.

Doubtless it never occurred to Peckham that he was bequeathing a puzzle for the canonist, not to speak of a pitfall for the theorist. He would have shaken his head meekly over Lyndwood's gloss, had it been revealed to him in vision. "You are sadly astray," he might have said. "Allow me, in bare justice, to rewrite that gloss. It will stand as follows:—

"*Permittimus.* Note that this word is used advisedly. We do not here say '*decernimus*,' '*statuimus*.' We are making, in our discretion as archbishop, 'non tam misericorditer quam etiam prudenter,' a concession which the law, in strictness, will not admit. It is a statutory permission, affecting the situation as it exists, and as, haply, it may exist in future if the abuse has to be re-handled at the same stage. Hard cases, it is said, make bad law; but this

bad law was made in the interest of good morals. As for the decretal which governed the case, our Provincial Council would have none of it. The truth is that the catholic people of this singular realm of England, 'quae in multis ab omnibus aliis est distincta,'[1] have in them a twist of stubborn reasonableness, a touch of intractableness, which is not always considered in the reverend decretals. They insist upon looking at the substance of a law, without any due sense of its intrinsic authority; they have small regard for any law which they have had themselves no hand in making. That is why, in our Provincial Councils at Reading and Lambeth, we had to toil at the work that was done at Lyons. That is why our liege lord Edward, who knows his people, has lately taken to summoning even the commonalty of the realm to attend him in Parliament. I had no little ado to impress all this upon the Holy Father. Concerned indeed was he to see a solemn decretal set at naught by so many of his faithful subjects, and ignored, perforce, by a responsible prelate so heartily loyal as ourselves. God grant that the Holy Father and his successors may be well ware of this Parliament of England, and gentle and considerate to us and our successors;

[1] Peckham's phrase in opening the Council of Lambeth, 1281. Wilkins, *Concilia*, ii. 51.

lest this strange realm, in its 'effrænata audacia,' should come to think more of our own poor Church of Canterbury than of the holy universal mother Church of Rome. Quod Deus avertat!"

That the story, as here told, has nothing in it fanciful and imagined appears plainly from a letter addressed by Peckham to Pope Nicholas III. in 1280. It leaves nothing unexplained in the real-world situation which produced Peckham's constitution 'Audistis.'

"To the most holy Father and Lord Nicholas, by the grace of God supreme Pontiff of the holy Roman and Universal Church, brother John, by divine permission bishop of the Church of Canterbury, with filial reverence and salutation (pedum oscula beatorum). You are perfectly aware, most holy Father, of the manner in which, tutored by your Holiness, I have proceeded for the extirpation of the unbridled boldness of certain, or rather many, who occupy ever so many benefices having cure of souls in contempt of apostolic dispensation. The plague was the worse for having wormed its way into many minds; and this evil, which none or hardly anyone in authority rebuked, was being regarded simply as a thing lawful, the statutes of the Council of Lyons about it being set at nought. Nor was it easy at once to reduce to modest

poverty men of birth who were affluent and accustomed to honours. While I was considering how, with combined severity and clemency, to give effect to your will and pleasure, ay and God's will, I was not a little comforted by the action of Anthony Bek, the King of England's most faithful secretary. On the third of August, by a sufficient instrument, he submitted to my will, in the province of Canterbury, his condition as to benefices having cure of souls. On enquiry as to the number, I found from his proctor that he held as many as five benefices with cure in the province of Canterbury. One of them, in the patronage of a certain priory, I decreed should be conferred (upon another) out of hand. Three of the remainder, having lay patrons, and also the fourth, the patronage of which is in dispute between a clerk and layman, I have left so far in his hands, until I learn from your wisdom what to do; for I am publicly informed that your clemency is disposed, in his case and that of certain other of the king's clerks, to impart the grace of dispensation. Wherefore I beseech your goodness, the memory of which is ofttimes a consolation in my distress, that you will deign in this to relieve my suspense of mind; for your Holiness knows that with a little help from your clemency and with the Lord's favour

I shall attain our purpose in regard to such things; which I should not have attained, nor should I attain in future, by any enterprises of rigour. This, none the less, I solemnly declare to your Lordship, that no man holding a plurality of benefices with cure of souls who has not the apostolic dispensation, have I received, or will I receive in future, to the grace of the Episcopate unless he has purged himself of this vice. May the Lord long preserve your high Holiness to His Holy Church." [1]

We may well feel for the Archbishop in his distress; but as a hapless reformer, not as an unhappy legislator. "I send you forth as lambs among wolves." Peckham was pressed into the Primacy,[2] and specially commissioned to 'extirpate' pluralism. He set about it valiantly, and yet discreetly. He stood up fearlessly to the King himself. He told the great Edward that pretty well the whole Church was grimacing at him, Peckham, for winking at the 'damnable' pluralism of the royal clerks.[3] And not long before, he hears

[1] Peckham, *Registrum*, i. 137–8.

[2] *Registrum*, i. lxiii.

[3] "Obsecramus igitur ne contra nos indignetur regia majestas, si noluimus cultum Dei minuere, et animas perditioni exponere, et bona pauperum convertere in obsequium Babilonis; nec decet regiam majestatem sacrilegiis abusibus patrocinium impertiri. Recolatis insuper quod pro dissimulatione quam facimus clericis vestris in damnabili multitudine beneficiorum quam obtinent contra Deum, per totam quasi ecclesiam subsannamur" (Peckham, *Registrum*, i. 199).

in a roundabout way that the Pope, after all the talk about judgment upon the evildoers, is thinking of covering their guilty nakedness; "I am publicly informed that your clemency is disposed, in the case of Anthony Bek and certain other of the king's clerks, to impart the grace of dispensation." So the world wagged, by the grace of politicians.

"Sancta informatione vestra edoctus," tutored by your Holiness. It is fairly clear from Peckham's letter that his course was taken with the, perhaps hesitating, concurrence of the Pope himself. It meant ignoring a Pope's authoritative decretal, and mauling the constitution of a papal legate. This Lyndwood sees, and it is all his texts permit him to see. This part of Peckham's ordinance is, on accepted legal principles, an anomaly; and he is obliged to point it out. But does he hold it, as Maitland makes him hold it, to be 'void'?[1] If he does, he has three good words in which to say so, 'nullum,' 'cassum,' 'irritum.' He uses none of these. He knew better. Lyndwood's avoidance of such words is some measure of the difference between his real view and the view which Maitland attempts to found upon him. 'Void' is the word of the legislator, not the commentator. It is used by Peckham, by Othobon, by the

[1] Maitland, p. 21.

'supreme lawgiver' himself; never by Lyndwood. There were good practical reasons for his caution. Suppose that in his later character as Bishop of St. David's, he had had to deal with an undispensed pluralist by process of law. No one had a better right to be a purist in law than this learned lawyer-Bishop. He attempts to bring down upon the delinquent 'Ordinarii locorum,' and pronounces sentence of total deprivation. John Jones, or whoever he may be, promptly appeals to Peckham's Constitution 'Audistis,' and to the Archbishop's Court. Lyndwood's successor as Official Principal is about to determine the appeal. But Lyndwood as bishop appeals to Rome, and the Archbishop receives a papal bull commanding him to suspend proceedings. The Archbishop thereupon tells the Pope, with many humble protestations and prostrations, that he is playing with fire; that Peckham's 'Audistis' is the accepted and undoubted law of the province; that if the appellant cannot have his case decided by the law of the province in the Court of the Province, it is but a Sabbath day's journey to the Court of Chancery, whither John Jones will assuredly go; finally, that the Judges of the King's Chancery have no respect whatever for any church law but that of England, and that he, the Archbishop, has no little ado to preserve any proper respect for that.

Whereupon the Pope, if he is as good a politician as most of them were, will tell Bishop Lyndwood that he had better make the best of what bad law there is, as more exalted prelates had had to do before him. And if Lyndwood had lived to be himself Archbishop and had been called upon to lead a crusade against pluralism, he would have found it not less impossible than Peckham to carry 'Ordinarii locorum' through his Provincial Council; and this owing to the inborn hatred of Englishmen, churchmen and laymen, for all that savours of vindictive legislation. He would have been glad enough to compass any real reform on the lines of Peckham's 'Audistis.'

And now we may touch upon the one remaining point in Maitland's case against Stubbs and the Ecclesiastical Courts Commission Report. He falls foul of Stubbs for saying that "the canons passed in the legatine councils under Otho and Othobon, which might possibly be treated as in themselves wanting the sanction of the national church, were ratified in councils held by Peckham"[1] 'Ratify,' Maitland contends, is an impossible word. "As to the theory that prevailed in the court of Canterbury during Lyndwood's tenure of office there can be no doubt whatever.

[1] Maitland, p. 26, Report i. Appendix, p. 25; cf. i. xviii. and Maitland, p. 46–7.

Peckham and his councils could not 'ratify' legatine constitutions. In such a context 'the sanction of the national church'=0." Is it all so mathematically certain as to suggest these trenchant symbols? We trow not. The theory that prevailed in the Court of Canterbury might best be gathered from its practice; and, unless Maitland had access to materials of which nobody else knows anything, he was as much in the dark about it as the rest of us. For the Court of Arches, so the present Dean informs us, possesses no records of an earlier date than 1660. Maitland says: "For the time we may leave open the question" whether Stubbs the historian or the legist Lyndwood is the truer guide to "the mind of Peckham and his contemporaries" (p. 26). We apprehend that the reader who has lent his patience to this discussion will be in little doubt. It may or may not be true, in the abstract, that "Peckham and his councils could not 'ratify' legatine constitutions." What is certain is that in the case of one of the most important of them he did not. He does not 'ratify' Othobon's 'Christianæ'; he rejects it. Well knowing what he is about, he puts it aside with a polite reference, just as he had put aside a Pope's brand-new decretal without any reference at all. Lyndwood might not have approved of this, but the Pope of the moment apparently

did. And 'Christianæ' is not the only case. When the Legate Otho came to England in 1237, he was concerned to find that a practice, enjoined by the Sacred Canons and prevalent elsewhere, of reserving the baptism of children for the two great solemn celebrations on the Eves of Easter and Pentecost, was very scantily observed. He heard, indeed, that the simple layfolk of England, 'Diabolica fraude decepti,' were possessed with an obstinate notion that if their children were baptized on those days, the Devil would fly away with them, or some other dreadful thing would happen. This is a sad superstition; and Otho says that the fact of the Supreme Pontiff himself celebrating baptism on those days 'in propria persona' is enough to show that there is nothing in it. He enjoins that they are to be turned from so great an error by frequent preaching. Parish priests are directed to teach their layfolk the form of baptism, so that they may administer it in case of necessity; Otho's idea apparently being that if they want their children christened at other times than at Easter and Pentecost, they must judge of the necessity and perform the rite themselves. The Legate Othobon, in 1268, recites all this, extends the injunction about teaching to perpetual vicars, and directs the Archdeacons to see that it is observed. Peckham, in 1279, has

Othobon's statute before him. It has been so far neglected; and Peckham, 'pro ipsius statuti reverentia,' proceeds to 'declare' its meaning; it is a very old device. Some odd fish come to Maitland's net, and one of his oddest captures is Lyndwood's note on the word 'declarandum.' "Nay more," says Maitland; "no English prelate, no English council, has any power to put a statutory interpretation upon these statutes. Archbishop Peckham in his provincial council may have incautiously used words which might seem to claim such a power. Lyndwood meets the possible objector. True it is that, if there is any real room for doubt about the meaning of the statute, then the statute-maker, and none other, can interpret it. But in the case before us the words of the legate Othobon are unambiguous and plain enough; so it is lawful for an 'inferior prelate' (*e.g.* the archbishop in his provincial council) to declare their meaning. In other words, our doctrine is that the archbishop can set an interpretation on a legatine constitution, provided that its words are so plain that they need no interpreter" (pp. 25–6). We are compelled to ask, Has Maitland troubled to read Otho or Othobon or this astonishing 'inferior' John Peckham? For what is it that Peckham does? Evidently regarding the statutes of these 'superior'

alien legislators as so much mischievous rubbish, he tells the layfolk of England that all Othobon meant was that children born within the week beforehand are to be brought to baptism on the two solemn Eves; and that as for children born within the other fifty weeks of the year, their parents can have them christened when they like, 'according to the old Custom'; which, as Lyndwood tells us in a pithy note, and with the usual reference to the Corpus, "is called the best interpreter of laws."[1]

And so on and so forth. In a few other instances Maitland cites other glosses of Lyndwood to the like curious effect. There is, to take but one more instance, the statute of Archbishop Stratford, in 1342, as to the right of the religious to let their benefices to farm. More than a century before, certain religious, said, uncertainly, to be of London, had complained to Pope Innocent III. about a statute of the 'Diocesan Bishops' forbidding them to do so. Innocent replied in a classical decretal to the effect that, "the statute of the diocesan bishops to the contrary notwithstanding," they might 'freely' let their tithes to farm, provided that it was for the good of their church and did not involve any transference of title.[2] Archbishop Stratford, with

[1] John of Ayton, ed. 1679, pp. 10–2, 80–1; Lyndwood, pp. 246–7.

[2] C. 2, Extra. 3, 18; c. "Vestra."

evident deliberation, ordains that they are not to be let to clerks without the Bishop's licence, and not to laymen 'quovismodo,' in any manner whatever. "With the approval of the present Council"—his mere Provincial Council, that is to say—he rides roughshod over Pope Innocent's decretal, and bruises not a few others in his passage. Such havoc is wrought by this statute among the decretals that Lyndwood is set wondering whether all whose presence was necessary to its validity were present indeed; 'ignoratur,' he says. Maitland devotes a learned page to reproducing one of Lyndwood's many learned glosses; the student may be interested in reading it for himself.[1] Here as elsewhere we see the same phenomena,—Maitland selecting glosses and neglecting texts, an Archbishop legislating as he could never have done had he conceived himself to be only a reduced facsimile of the 'supreme lawgiver.' We see throughout what we have seen at length in Peckham's 'Audistis,' of which we will take leave with one more word. 'Audistis' was a strong act of substantive authority. Are we to regard it as an act of insubordination? Did it imply any general claim, on the part of the archbishop, to 'pick and choose' among the decretals? Assuredly no. Peckham's own mind is shown, not only

[1] Maitland, p. 24; Lyndwood. pp. 154–60.

in his dutiful letter to Pope Nicholas, but in the latter part of this same constitution, in which he proceeds, with a free hand, to determine matters for the future.[1] He here overpasses the deeds of the righteous in his devotion to the 'Roman Canon Law'; he reproduces it, in its express form and feature, with the grim rigidity of an undoctored photograph. And still Lyndwood is uncomfortable. Peckham ordains that for the future no one is to hold two benefices with cure in full title without dispensation from the Holy See. The Jus Commune, indeed, allows one such benefice to be held in conjunction with another not in full title, but committed 'in commendam.'

Yes, says Peckham, provided that the rule recently laid down by Pope Gregory x. in the Council of Lyons be rigidly observed — the rule, namely, that the commendam be granted for some reason of necessity or good to the church, and that it be committed only to a clerk of lawful age, in priest's orders, and for not more than six months.[2] Any one who, without a dispensation from the Holy See, holds two benefices in title, or one in title with another in commendam which is not according to Pope Gregory's decretal, is to

[1] Lyndwood, p. 137; see Appendix A. iv.
[2] C. 15 in Sexto, i. 6, "Nemo deinceps."

be deprived of all benefices so held, and excommunicated. The excommunication is a zealous improvement upon the Jus Commune, such as, Lyndwood informs us, an inferior legislator has a right to make. And yet, somehow, he seems obscurely dissatisfied with Peckham for making it. We apprehend that by the time he came to these final glosses, his patience was beginning to wear a little thin. The reader has not been tried by the scientific necessity of working this very much alive Archbishop into a cut-and-dried theory of law; but his patience, too, may not be inexhaustible; so we will say good-bye to Peckham.

There are other positions of Maitland which would call for serious treatment if the exigencies of our task allowed. We must leave one or two of them with barely a word.

He dwells, and rightly, upon the dilapidation into which the study of the Canon Law was suffered to fall from the sixteenth century onward. Its quasi-proscription and neglect has, in history, the same sort of political significance as the destruction of the monasteries. Revival is no more impossible in the one case than in the other; and the time is overripe.

This mischief would have been even more serious but for another 'catastrophe,' upon

which Maitland dwells less satisfactorily. The spiritual courts begin to enforce Acts of Parliament, and to have "their decisions dictated to them by acts of parliament" (p. 91). Maitland does not tell us, what is nevertheless true, that the old rules of the Canon Law, so far as they had proved salutary, were incorporated wholesale in these Acts of Parliament; and that in their novel guise of the law of Parliament they attained a currency and effect which, in all probability, they had never had before.

But Maitland dwells especially on Lyndwood's constant citations from the foreign doctors, and upon the slight degree in which English learning contributed to the fabric of the Corpus Juris. These facts he uses in support of his polemic. To our mind their bearing is directly the other way. It was little likely that the schools of a country, whose princes maintained, as in England, a rigorous censorship of papal bulls, should ever emulate the lore of Bologna. The obvious reason why England did so little, comparatively, for the 'Roman Canon Law' was that England, comparatively, had so little to do with it. When we read in the records, as we frequently do, of the scant observance of her own church law, we may be very sure that the more elaborate law of the Corpus was observed even less.

The study of the Corpus centred naturally in the Italian Universities, as the practice of it centred in the Roman Curia; its loftier developments were not to be looked for in Cheapside, for the same sort of reason that our present School of Tropical Medicine is in Liverpool, the commercial gateway of West Africa, and not in Connemara or the Isle of Mull. The one significant fact in this connection envelopes Maitland like broad daylight. It is the fact that England did produce one solid work of original learning on the Canon Law; that its author dealt with his subject-matter precisely as Raymond of Pennafort had dealt with the decretals, and with little less of deference; and that the law so dealt with on the model of the decretals and associated, not meanly, in authority with the decretals, was the provincial law of England.

We may conclude with some words of Maitland in which he lucidly restates this great issue; they have their proper place at the close of this chapter.

"It may be true that, owing to one cause and another, the time at which Lyndwood wrote was the time of all times at which orthodox Englishmen were papally minded. . . . We may remember that in the fifteenth century a lawyer might prostrate himself before the papal omnipotence and yet mean but

little by the more extravagant of his phrases. The less the popes could do in the world of fact, the larger were the powers that might be safely attributed to them by theorists who were in search of that juristic desideratum, an all-competent sovereign. Our canonists obtain an intellectual luxury at a cheap rate when they place the *plenitudo potestatis* in a pope whose bulls, if like to be troublesome, will never reach their hands, but will be impounded by a secular power for whose doings they are not responsible. But what we ought to study if we would know our ecclesiastical courts, is the method and scheme of Lyndwood's book, more especially the theory that it applies when it determines the comparative authority of provincial constitutions and papal decretals. Here, if anywhere, we ought to see professional tradition, the tradition of the court over which Lyndwood presides; for questions about the relation borne to each other by the various sources of law must be frequently taking concrete shapes and crying aloud for decision. Of course it is just possible that even here Lyndwood is innovating, that he is attacking the general opinion of his predecessors or turning it inside out. If so, he is accomplishing his revolutionary design in a marvellously cool and dispassionate manner. The 'Provinciale' does not wear the air of a book that is

assailing old beliefs or a rooted course of practice. Nothing could be less polemical. It seems even to shirk the burning points of current controversy. Lyndwood is writing an elementary law-book for beginners, and it is not in any argumentative disquisitions about legislative power but in the practical solution of everyday problems that his absolute submission to the *jus papale* becomes patent. He does not set himself to demonstrate in solemn form that an English council cannot derogate even from a legatine constitution; it does not seem to enter his head that any one will dispute so self-evident a proposition.

"But the time for a defence of Lyndwood's legal orthodoxy will have come when his heterodoxy—that is, his departure from an established Anglican tradition—has been asserted. In the meantime I cannot but think that his work casts a heavy burden of proof upon the theory which would paint our English ecclesiastical courts selecting the decretals that they will accept, or which would ascribe to the three papal law-books 'great authority' indeed, but no statutory force. Has that burden of proof ever been borne? Has an attempt been made to bear it?" (pp. 48–50).

We have essayed an attempt, but to prove no such theory. It is a figment. It has fashioned itself in Maitland's mind through

the unscholarly reading of a scholar's words. Our attempt has been to show that Stubbs, in committing himself to the statement that "the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts," had a meaning perfectly definite, perfectly true, and perfectly misunderstood by his vivacious adversary. Like Maitland, we have leant much on Lyndwood, though without forgetting that Lyndwood, like the rest of us, may have been a fallible mortal. Our argument has not required us to accuse him of innovating, of heterodoxy, of departure from an established Anglican tradition in the practice of his special craft. It has been sufficient to regard him in his proper character, as a man of law busy with a book of law, and availing himself of those formal conventions without which no law-book was ever written. His reliance upon them does not argue, necessarily, an 'exuberant papalism';[1] it need only mean that he is a conscientious legist, sticking religiously, in one of Maitland's phrases, to his legal last.

[1] Maitland, p. 99.

VI. WHY THE 'PROVINCIALE'?

And now it is time to bring before the reader a fact which gave, at the outset, some encouragement to this investigation, because it went to suggest the *prima facie* weakness of any notion which should represent the Provincial Constitutions as mere 'bye-laws'[1] of small moment or significance. That fact is the simple existence of the 'Provinciale.' If the Provincial Constitutions are what Maitland represents them, and supposes Lyndwood to represent them, why is the dust which should properly cover them disturbed? Why, above all, is it disturbed by Lyndwood? "The more carefully we examine these constitutions from Lyndwood's point of view, the lower will be our estimate of their importance" (p. 35). But what, let us insist, is Lyndwood's point of view? That is precisely our problem. We have, on the one hand, some slighting references to certain of these Constitutions, some clear but guarded reminders, now and then, that the seat of sovereign legislation in the Church

[1] Maitland, p. 35.

does not, after all, reside at Lambeth. On the other hand, we have the fact that Lyndwood is at the pains to codify these Constitutions, and to furnish them with an elaborate and learned commentary—the most important contribution to the literature of the Canon Law which we owe to any English hand. Are we to suppose that this man, one of the ablest and busiest ecclesiastics of the day, an eminent jurist, a trained diplomat and servant of the Crown, holding "the great prize of his profession" (p. 5) and dispensing the justice of the Archbishop's Courts, could or would have occupied himself in editing and annotating a code of 'bye-laws'? Nay, are we to go further and regard the book, with Maitland, as nothing more than "a text-book for beginners" (p. 15)? If so, was Lyndwood the kind of man who was likely to write it? Was the 'Provinciale' the kind of book he was likely to write? This estimate of the work, as "an elementary law-book for beginners,"[1] appeared, at first sight, such a palpable misdescription as to send us, with eager interest, to the gloss on which it was professedly based. And it appears to us to read quite differently. Lyndwood is speaking of the type of running commentary, as distinguished from that which proceeds by way of successive verbal annota-

[1] Maitland, p. 49.

tions. He takes occasion to say that his own first idea in editing the 'Provinciale' was to adopt the method of the running commentary. "Et juxta hunc modum in hac Compilatione proposui materias occurrentes tractasse. Sed quia non solum sapientibus sed insipientibus (ut loquar cum Apostolo ad Roma. 1) debitor sum; et præsens opus non præcipue nec principaliter viris scribo scientia literarum præditis, sed potius simpliciter literatis et pauca intelligentibus, quorum labor, ut plurimum, magis assuescit in inspiciendis Constitutionibus Provincialibus quam aliis Ecclesiæ Constitutionibus Generalibus: propterea, ad faciliorem harum Constitutionum intellectum, qui ex verborum expositione et eorundem significatione resultare potest, ad majorem utilitatem simplicium in hoc opere studere volentium, sic ut patet procedere dignum duxi, aliqua juxta verborum proprietates ad utilitatem eorundem studentium interferens quæ ex ipsarum Constitutionum sententia sumi, seu alias convenienter tractari minime potuissent."[1] That is to say, on second thoughts I decided to follow the other plan. I remembered, with St. Paul, that I was a debtor, not only to the wise, but to the simple, and that I was writing, not mainly or principally for scholars, but for men of modest

[1] Lyndwood, p. 95, ver. "Commenta."

education and limited understanding—such men as were more likely to be occupied with the provincial legislation which concerned them than with the fuller jurisprudence of the Corpus Juris; with such readers in view I decided for the plan of verbal annotation, as giving an opportunity of explaining, in detail, the simpler elements of the law.

Now I venture to think that the last person whom Lyndwood has in mind in the above passage is the budding student of law. The budding student of law would have been directed at once to the great papal compilations, and would have had little enough to do with such comparatively humble subject-matter as that of the 'Provinciale.' The "simplices in hoc opere studere volentes"—surely the very words preclude the law student—whom Lyndwood contemplates as among his possible readers, are doubtless the ordinary country clergy, interested in learning, with his help, their own and their people's rights and duties as laid down in the Constitutions of the province. It was just like Lyndwood to bear them in his thoughts. This admirable lawyer and man of affairs was by way of being a saint as well; in capacity and in disposition he might be an elder brother of Sir Thomas More. We have a notable description of him in a letter written by his master, Henry VI.,

to Pope Eugenius IV., recommending Lyndwood for appointment to a bishopric which was likely to become vacant. In this, among many other noble things, we are told that he is a man "castum, humilem, et modestum," and free from any trace of small ambition.[1] It was quite in the character of such a man to remember that he might have among his readers, not only the learned advocate of the Court of Arches, but the plain country parson who was no lawyer and had no wish to become one, but might still be glad to know his way about the law. A learned work may be so planned and executed as to bring it within the compass of simple minds, and it was this that Lyndwood aimed at doing. As to the 'Provinciale' being merely "an elementary law-book for beginners," we venture to put aside that description, not only as partial and inadequate, but as wholly mistaken. It rests upon a misreading of the foregoing gloss, and it takes no account of other evidence which should have been among the first to claim attention. I refer to the eloquent dedicatory Preface addressed by Lyndwood himself to his friend and patron, Archbishop Chichele. This preface will lead us a little further in our inquiry; it has claimed too little of Maitland's notice.

[1] *Official Correspondence of Thomas Bekynton*, i. 2, Rolls Ser.

Lyndwood begins by reminding the Archbishop that it was at his own urgent suggestion ("Vestræ Paternitatis Reverendissimæ hortamentis instigatus") that he had undertaken to edit the Provincial Constitutions. His material he had found in a very unpromising state; it had taxed his mental resources to bring it into any compass and order. The provincial statutes contained "plura nimia sub multitudine edita"—the wood invisible for the trees. There were blunders of copyists to be set right: the effective sense had sometimes to be extricated from among long-winded preambles; some were vague and of uncertain authorship; many had nothing to do with spiritual interests, and could show no reason for being where they were. Under these circumstances he had selected those of them he thought would be more useful, and, after pruning, abbreviating, and correcting, had brought them together into one work, arranging them after the model of the Book of Decretals. At this point he had gone to Portugal as Ambassador, his mission terminating upon the death of King Henry v. Once more in England, he reassumed his duties as Official Principal, and in the following year, 1423, he returned to work upon the Provincial Constitutions and set himself to provide them with a commentary (*eadem*

statuta glossare proposui. One consideration which moved him was that, in the process, he would equip himself more thoroughly for the arduous and delicate work of his court. But there was another consideration. These Constitutions had been drawn from the very marrow of Scripture and the Sacred Canons and from the undoubted sentences (*indubitatisque sententiis*) of theologians and authentic doctors of Canon and Civil Law; they had been designed for the good of Christian people of the province, and were manifestly full of matter tending to the confirmation of faith, the reformation of morals, the guidance of conduct, and the health of souls. Notwithstanding all this, they had fallen into very general neglect, and that not only among ordinary people, but among bishops and other prelates and judges; few, indeed, were they, in these times, who were careful to observe them, as reason would. To recall them speedily to their pristine observance, to imprint them readily and firmly upon the minds of all—not ordinary people only, but the aforesaid prelates and judges as well—their meaning needed to be made clear and easy of investigation. The better the work, the better the result; the more their value was realised, the more would they be put in use. He is sensible of many omissions which, had the constant pressure

of business permitted, he would have laboured to supply; but his work, such as it is—these Constitutions with their critical apparatus founded upon approved doctors—he presents, with the zeal of the poor woman of the Gospel, as an offering to the Treasury of the English Church. And so, in some final moving phrases, worthy alike of the devoted scholar and the humble and single-minded servant of God, he submits himself and his 'Provinciale' to the most reverend primate and to the better judgment of the Church.

Now this preface, if we observe it steadily, will appear full of matter. It disposes at once of any suggestion that the 'Provinciale' was, or was intended to be, "an elementary law-book for beginners"; but let that pass. And let the careful reader, eschewing all petulant imaginations, observe what Lyndwood says; surely it is very remarkable. These Constitutions, into which fourteen archbishops, over a space of two centuries, had put their souls, are regarded, *temporibus his*, with pretty complete neglect; they are neglected, not only by the ruled, but by the rulers—the bishops and other prelates and judges of the province. The texts which contain them are unconnected and unordered. They require of an editor something more than the pruning-knife; he has to attack them, as it were,

with a billhook, like a man clearing an old path through tangled brushwood. These Constitutions, so to be delivered to the light, are undoubted morals and, what is more, undoubted law, however little the Church courts, which are humming with activity, may be aware of them or troubled with them. They are not all venerable; a fair proportion of them belong to Lyndwood's own lifetime. He sets to work to extricate them and to make them the kernel of an elaborate treatise, embracing, explicitly or implicitly, the whole field of ecclesiastical law. He does so at the urgent suggestion of the Archbishop.

Now what are we to make of this? Is it just a work of fusty antiquarianism to which these statesmen, Chichele and Lyndwood, are setting their minds and hands? The question answers itself. Such men must have had some reason—some sound, some politic, some pressing reason—for addressing themselves to such a work, under such circumstances, upon such a plan. Is there anything in the known conditions of the time which will afford a clue to the reason? Let not the gentle reader imagine that he will find the reason, supposing it to exist, upon the face of the documents. That was not the way of the Middle Ages, or of the men who made them. Their hearts, and motives, were not worn upon their sleeves;

their sleeves were where they kept their laughter. The ages of faith were even more the ages of a certain great, deep, subtle, Gargantuan humour. In those days good men found it work enough to get the needed things done, without a too elaborate candour as to the reasons. We are launched upon a search therefore, and the search involves a retrospect.

Before the Conquest the papal hold on England was slight and shadowy; it amounted to nothing that could be called jurisdiction. Hildebrand, with his new bonding of the ecclesiastical fabric, William, with his eager train of Norman prelates, soon altered all that. Under the Norman kings the papal writs ran free in England as elsewhere, though under trenchant safeguards for the interest of the Crown. Here, as elsewhere, the Pope established himself as Universal Ordinary; the reign of Stephen saw a riot of 'appeals.' Coincidently, the broad base of the great Corpus Juris Canonici was laid in the completion of the Decretum by Gratian, the learned monk of Bologna. Carried forward through the later compilations—the Book of Decretals, the Sext, and the Clementines—it had, as a Corpus Juris, its source and sanction at Rome, and so can be described, with sufficient warrant, as 'the canon law of Rome.'

Within three years of the publication of the Decretum there came to the throne of England a prince who was also a mighty lawyer. Henry II. may well be called the father of English judicature. Ten years after his accession we find him, in the Constitutions of Clarendon, crossing swords with Becket and the new-fangled papal law. Neither party emerged scatheless; but one assured result remained over from the mêlée. In the time of Henry and onwards, the Crown of England invaded and annexed one whole department of jurisdiction which the canonists claimed, and continued vehemently and vainly to claim. It concerned the law of patronage, the Jus Patronatus. When Henry vindicated for the lawful patron, ecclesiastical and lay, the right to defend his title in the courts of the Crown, neither he nor his advisers can have been fully aware of what they were doing. As a matter of fact, so far as England was concerned, they were removing the linch-pin from the papal car; a rough road and reckless driving would mean, in time, the foundering of the whole structure.

So it proved. The Popes were already claiming, and the canonists were dutifully exalting their claim, to dispose of all ecclesiastical dignities and benefices at their own will and pleasure. Needy and greedy clients, armed

with papal 'provisions,' were lying in wait for voidances and intruding into vacancies in derogation of the lawful rights of patrons. Bishops, under stern monitions from the Holy See, were executing the 'provisions.' The lay patron had his remedy at hand; the writ of QUARE IMPEDIT was at his service. It was at the service equally of clerical patrons—the electing chapters, for example—had they been stout enough to invoke it. But their position was different. They would be fish out of water in the Court of Common Pleas. They believed in their conscience that, by the express ordinance of the Lord Jesus Christ, the Pope was sovereign of the Church; and that though, in this life, as John of Ayton says, he might bring the Church to confusion and pay for it accordingly in the world to come, there was no remedy in this world present. But John, and the Holy Father too, were reckoning without the Crown and Parliament of England. QUARE IMPEDIT is well enough in its way; but an ampler remedy must be provided. And so, in the spacious days of Edward III., between Crécy and Poictiers, while the Pope is at Avignon and the archers of England are promenading the neighbourhood, we have the wide-sweeping Statutes of Provisors, whereby, if the clerical patron is molested in his rights, the collation, be it to a bishopric or to any

lesser dignity or benefice ecclesiastical, shall devolve, for that turn, to our lord the King, or other the proper lay founder. But the 'provisors' were not done with yet. The Curia was a welling fount not only of 'provisions,' but of 'bulls, processes, instruments, and sentences of excommunication' against all and any who presumed, under the protection of the new statute, and the old common, law of England, to hinder their effect. And so, hard upon the law of Provisors come the fateful Statutes of Præmunire, by which it is enacted "that all the people of the King's ligeance, of what condition that they be, which shall draw any out of the realm in plea whereof the cognizance pertaineth to the King's Court; or of things whereof judgments be given in the King's Court; or which do sue in any other Court to defeat or impeach the judgments given in the King's Court," shall surrender to justice within two months or flee the writ of PRÆMUNIRE FACIAS, which means outlawry, forfeiture and imprisonment, or banishment in default. Well might Pope Martin v. wring his hands over these statutes, and adjure his most beloved son Henry VI. to search through the whole law of England and see whether, even against very Jews and Saracens, such dire penalties were enjoined. But the statutes stood; neither pleas nor maledictions would

expunge them from the statute-book; and the ink upon the latest of them was scarcely dry when William Lyndwood began to qualify for the doctorate of Canon Law.

And now, as we proceed with Lyndwood into the fifteenth century, a new phenomenon appears. The secular judges are attempting to bring ecclesiastical jurisdiction even within the realm, in the courts of right English Primates, Bishops and Archdeacons, within the shadow of the Law of Præmunire. The statutes had been aimed, very definitely, at persons suing certain definite kinds of process in the Court of Rome; but they included, for some obscure reason, the words 'or elsewhere'; and now the judges were discovering 'elsewhere' beneath Bow Bells, in the Court of Arches, the court whose president was William Lyndwood, within an easy stroll of Westminster Hall. Such a construction of the law was unheard of; it seemed, to Holy Church at any rate, against the plain tenor of the statutes and the express formula of the dreaded writ. For all one could gather from the protests of the clergy, it might be due to nothing but the perversity of the judges. But the procedure was so bold, and so designedly unnerving, as to call, if it may be, for some more rational account. Again we must betake ourselves to retrospect.

The publication of the Clementines, in 1318, had put, not quite the coping-stone, but the uppermost courses, to the edifice of the papal Canon Law. At that date, and afterwards, and long before, the Corpus Juris Canonici had been, as Bishop Stubbs will tell us, the material of legal education in every university in Europe. Unvenerable archdeacons, fledgling advocates and proctors, came flocking home from Bologna and Pavia with their morals in many cases undone and their heads full of ambitions and the Corpus Juris. Their fattest briefs they would secure in long-drawn suits before ephemeral courts delegate, constituted for the occasion by papal writs to try the issues between A. and B. regardless of cost. These were the so-called 'appeals,' the præ-judicial process by which a defendant could invoke the Court of Rome in restraint of all regular jurisdiction. These courts delegate, sitting in England, composed of Englishmen, here to-day and gone to-morrow, were emanations from the Curia; for them, and the learned doctors who pleaded in them, there was no jurisprudence but that of the Corpus. Moreover, the Court of Arches, the most important standing church court in the kingdom, could be, at will, either a primatial or a legatine court, the archbishop being 'legatus natus'; more and more would its judge and counsel, learned

in the law, be unlearned in any law but that of the Corpus. More and more, throughout the courts generally, would practice tend to follow along the lines of legal training.

And now let us suppose certain things. Suppose these influences to have been at work over an extended period. Suppose that the church courts then were as fully occupied, relatively to their age, as are our civil and criminal courts to-day. Suppose their advocates, in daily causes, are thinking in, and bandying citations from, the Corpus Juris: while the old 'traditional law' of the Church of England and the Church Catholic, a law essentially of discipline and not of property and precedence, falls further out of sight and out of mind. We shall see, as we look over Lyndwood's shoulder, the statutory legislation of the Province yellowing gradually in records and archives; and the Constitutions of a long line of archbishops, of to-day and yesterday and long ago, coming to be regarded as statutes of discipline, operative more or less within the sphere of administration, but hardly current in the sublunary world of daily legal business. And now suppose that in the purlieus of the Arches, among the close coteries of advocates, 'doctores utriusque juris,' there grows up, as such things will, a somewhat cavalier tone as to the restrictive proceedings of the secular

judges, or the legislative efforts, past and present, of their Graces of Canterbury in Council. Suppose that among the more incautious of them, the more youthful, progressive, and papally minded, this cavalier tone, passing beyond the plane of common-room cant, begins to manifest itself, from time to time, in public speeches and public acts: which have to be held in check by the time-honoured writs of prohibition. And suppose, finally, that having had enough of all this, the Common Law Judges, who have a common-room and melancholy humour of their own, invite the worthy Canonists to dinner, and presently commune with them as follows :—

'Brothers, diverging for a moment from these agreeable topics, we have something rather serious to say. There are influences at work which occasion us disquiet. The Courts of Christianity which you adorn seem tending more and more to become a mere adjunct of the Roman Curia, which is, as you know, saving the reverence due to the Holy Father, an old enemy of ours. The jurisprudence you practise is, from our point of view, essentially foreign. Certain bulky chapters of it are of course excluded absolutely by the laws of the realm; but apart from this, its tendency to encroach upon our Common Law seems to be incurable; the writs of prohibition we have constantly

to be issuing amount to a nuisance. Moreover —and to this we invite your careful attention— we are credibly assured that even in regard to matters in which we, personally, have no interest, this law of yours is, in some not unimportant respects, clean contrary to the statutes of the Province which have been duly enacted by the Archbishops in Convocation and promulgated with the allowance, express or tacit, of our lord the King and his noble progenitors. These statutes have, for this Church and nation, an express authority to which these other laws of yours can lay no claim. They may need to be supplemented, but we warn you that they cannot safely be disregarded. These things demand attention. If, as we are inclined to fear, the Courts Christian within this kingdom are coming to be conducted as a mere annexe of the Roman Curia, it must be manifest to you, as to us, that our writs of prohibition no longer meet the case, and are mere peddling. We have of course at our disposal in such circumstances the more searching writs of PRÆMUNIRE FACIAS; for it may be courteous to remind you that, by the wise forethought of Parliament, the Acts, while definitely referring to the Court of Rome, include words which, though somewhat curt and general, adapt themselves easily to such a case as yours. These

views of the position appear to startle you; but you will be able to reflect upon them at leisure. And now let us return to lighter things.'

At what precise moment do the common lawyers begin to talk in this fashion, and to act accordingly? We turn to the records of Convocation, from which, in fact, we are being made aware of what is going on. We find that the chief cause of the summoning of Convocation in 1434 is the abusive issue of writs of PRÆMUNIRE FACIAS in restraint of the church courts WITHIN THE REALM. Archbishop Chichele, presiding, declares that "ecclesiastical jurisdiction, through the King's writs 'et alias vias exquisitas et imaginata brevia,' is being disturbed and hindered beyond the ordinary." The special bugbear are "those writs of PRÆMUNIRE FACIAS, which, until within a few years back, were never current on any matter within the kingdom."[1] The mischief has reached a point which calls for formal action; and a committee of doctors and bachelors 'in utroque jure' is deputed to take evidence and draw up gravamina in writing. Nothing came of it, however. Plague broke out; Convocation broke up, the assembled clergy being anxious to get away from under that 'pestiferous

[1] Wilkins, *Concilia*, iii. 523.

constellation.' Before dispersing, however, Master Thomas Bekyngton and others were directed to prepare a more concise English edition of the 'sentences of cursing' which were customarily read in the churches once a quarter. The sentences are comprehensive; but they begin, significantly, with an anathema against them "that presume to take awey, or to pryve any churche of the right that longeth therto, or elles ageyn right stryve to breke or trouble the libertees of the churche. And also they that purchace any maner letres fro any temporal court, to lette any processe of spirituel juges in suche causes as longeth unto spirituel court."

In spite of cursing, however, the matter was up again in 1439. The Archbishop, this time with tears in his eyes, explained how, by these same woful writs, the Church's jurisdiction was being, not only disturbed and hindered, but 'enormiter læsa,' enormously damaged. Proceedings followed; a 'bill' was drawn up in Norman-French, a very true bill; steps were taken to engage the co-operation of the Primate of York; the whole ended with a petition to the Crown. The King received it 'benigne et gratiose,' and promised that, though he had not fully advised with his Council 'ad declarandum hujusmodi breve,' it being too near Christmas, he would

direct the judges not to issue any writs of PRÆMUNIRE without his own and his Council's consent until the opening of the next Parliament.[1] The next Parliament brought no satisfaction; for eight years later, in 1447, John Stafford having succeeded as Archbishop, not the Southern Convocation only, but "youre devoute and humble chaplayns, the archebishopes of Caunterbury and of York, the bishopes and other prelates, and al the clergie of your reame of Englande" unite in a still more urgent petition.[2] From that time the trouble seems to abate; in some way a *modus vivendi* was reached. The dreaded writs remained *in terrorem*, but were very rarely brought into play; only one case is mentioned by Coke before the reign of Henry VII. It is clear, however, that the common lawyers, having taken up their position, never abandoned it; and Coke affirms it as a matter of course. To this day, though we have long got rid of the Court of Rome, we have not got rid of the writs of PRÆMUNIRE; somewhere in the back of the legal cupboard, the common law can still put its hand upon them.

Our concern, however, is with the beginning of the story. What are we to make of Chichele's words in 1434, that the aggression complained of was a recent aggression, and had been

[1] Wilkins, *Concilia*, iii. 533–5. [2] *Ibid.* iii. 555–6.

unknown until 'within a few years back'? They will carry us, of course, to 1429, when Convocation is arranging for some coming denunciations at Paul's Cross, which point to an unwonted flutter, pretty certainly on this matter, in the ecclesiastical dovecotes.[1] They will carry us easily to 1426, when, in accordance with a well-known law of human nature, any disposition on the part of the common law judges to strain the statutes may have been stimulated by the very curious agonies of Pope Martin v. to get them abrogated altogether.[2] Can we go back any earlier? At this point attention is attracted to a suit which came before the royal courts in 1409.[3] A certain prelate preferred to the see of St. David's, is endeavouring, by virtue of a papal dispensation, to retain a prebend in the Church of Salisbury. His right is disputed by the Crown. The King's advocates, "seemingly by way of afterthought" (says Maitland), invoked the law of Provisors and Præmunire. Counsel for the Bishop do not challenge the application of the law; but protest that in fact the law has been allowed to slumber, and that it is hardly fair to awaken it suddenly to the prejudice of their client. The contention was doubtless true. Since

[1] Wilkins, *Concilia*, iii. 516.
[2] *Ibid.* iii. 471–86.
[3] Maitland, p. 69.

the passing of the latest and heaviest of the statutes, in 1392, both Church and nation had had their hands full with Lollardy. It is plain, however, that in 1409 the common lawyers are already beginning to measure the length of this new legal lash. The significance of the case, for our present purpose, consists in the fact that the prelate concerned in it was translated, five years afterwards, to the primatial see of Canterbury, and that he is none other than Lyndwood's patron, Henry Chichele.

It was a critical moment in the fortunes of the Church. The story which makes Chichele, intent on screening her angry sores, a prime mover in the war of Agincourt, is doubtless, in the form in which we have it, a clumsy fabrication; but it holds a core of reason and fact. There were hazards to be faced on every hand. Abroad Bohemia was already full of lightnings; at home the Church had Lollardy by the throat. The Court had only just been purged of it; it was rife in the country; Sir John Oldcastle was still at large. Hungry lay eyes were being bent malignly upon the riches of the Church. Had Chichele any nearer cause of solicitude? He had. Within four years of his accession, we find that he has sudden and grave reasons for keeping close to Westminster. In 1418 he obtains from

Martin v. a bull permitting him, if interrupted for 'lawful and reasonable causes' in the course of a metropolitical visitation, to complete it by sufficient deputy. Apart from the general business of the King, the one specific and surprising cause alleged is the necessity of "preserving the rights of his Church of Canterbury."[1] Is there any circumstance, in the conditions of the time, which will account for such a meaning phrase? None imaginable to us, unless it be an attack, a grave and unwonted attack, by the common law judges upon the Arches Court. In and from this year, therefore, we should venture to date the endeavour of the common lawyers, by means of writs of PRÆMUNIRE FACIAS, to hold up Church judicature even within the realm.

Now Chichele was himself a lawyer, 'doctor utriusque juris,' "Juris lucernam in Ecclesia Anglicana radiantem," as Lyndwood calls him.[2] He was, by position and evident sympathies, a patriot and a nationalist; and he was, none the less, a devoted prelate of the Church. If an attack, in terms of præmunire, can be made upon his Provincial Court, and if it can be made good, he sees in a moment what the issue will be. It will be that, at the very moment when the Church is locked

[1] Wilkins, *Concilia*, iii. 390. [2] *Provinciale*, Preface.

in a death-grapple with Lollardy, her common discipline ' pro salute animæ ' will be paralysed and brought to nought. And that, from the point of view of a mediæval Churchman, is the end of all things. It is not now a question of the Court of Rome, but of common obedience and order in every little parish in England. We can imagine the Archbishop exerting influence in private to forestall the mischief, and thinking meanwhile under pressure. He sees that the Statutes of Præmunire have come to stay, and, as a patriot and a nationalist, he is not wholly sorry. But he sees, suddenly, the grave danger that their operation may be extended in restraint of ecclesiastical judicature even within the realm; he knows too well that there is much in the latter-day conduct of the courts Christian to give colour to the invasion. He sees that the law which they administer has become suspect, and not undeservedly, from the point of view of the common lawyer. It becomes clear to him that if the canonical jurisprudence is to be preserved, it must receive a wholly new orientation; or rather, its elder orientation must be restored. Intact in substance, it must cease to be, in principle and aspect, merely the ' canon law of Rome.' If the courts of the Province are to continue un-

molested, they must have behind them an authentic law of the Province, 'statuta' valid as those of Parliament, immune from the cavils of the common law. The Provincial Constitutions, old and recent, must see the light of day; they must have, with allowance for natural obsolescence, the force of law; for this Church and realm, at any rate, they have a substantive authority which neither Parliament nor the Common Pleas will dispute. They need not pretend to be the whole law; they were plainly nothing of the kind; but, imperfect though they were, they were cemented firmly into the Constitution of England, a sure staple on which the whole law could hang. We can imagine the Archbishop closeted with Lyndwood, the foremost canonist in England and his own Official Principal. "This is the position," he will say, "grotesque enough. It is needless to look innocent. You, if I am not mistaken, were concerned in that interesting proceeding five years ago, when, in the very midst of our struggle with Lollardy, the Lower House informed us prelates that the Church was suffering from a disordered stomach because the clergy, the digestive organs of doctrine, were left to do as they pleased. You—or I am greatly at fault—knew more than a little of that portentous string of rusty constitutions which you pre-

sented, and, with urbane audacity, summoned us to enforce.[1] And not before it was time. The constitutions have to come alive, come alive as law, and that speedily; it is a case of that law, or no law: if I divine the drift of these people at Westminster. There is only one thing to do; and there is only one man to do it. What say you?"

"Vestræ Paternitatis Reverendissimæ hortamentis instigatus," we can imagine Lyndwood replying, "I will do my best."

And he goes to work accordingly. Between now, say 1418, and his mission to Portugal, he has ample time, 'sedula mentis intentione et frequentis lectionis studio,' to complete the task of digesting the Constitutions and 'collecting them into one work.' Whatever Lyndwood's purpose hitherto, it must have gained, on his return home in 1422, a new urgency and definition. Henry of Monmouth, the *preux chevalier* of God and England, was dead. The King was a baby in arms; the realm, for years to come, would be in the hands of nobles and lawyers; against legal chicanery the Church would have more than ever need of protection. And so he plans, and proceeds to execute, his gloss upon the Constitutions. It is hardly well under way when an instructive interlude occurs. Pope Martin v., who is well

[1] Wilkins, *Concilia*, iii. 351–2.

enough aware of the trend of things in England, is ill-advised enough to attempt a frontal attack upon the law of Præmunire. Nothing will do for him but its utter abrogation root and branch. In 1426 we have him writing to the Archbishop, the King, the Parliament of England, adjuring them, by the high sanctities of a paternal solicitude at which the Papacy has long been teaching all the world to laugh, to make away, once for all, with that 'execrabile,' that 'abominabile statutum.' The correspondence is amazing. We see the Pope's deadly earnestness impinging upon the deadly humour which is born in Englishmen when they too, for one reason or another, are very much in earnest. They maintained, as was fitting, a fair countenance; until Martin, losing patience and suspicious of being played with, proceeded, after much ineffectual nagging, to suspend Chichele from his legation. Without more ado the Government closed the incident, impounding the papal bulls as "to the prejudice and in contempt of us and our royal dignity, derogatory to the rights of our Crown, and plainly against the laws and statutes of our realm of England." [1]

And meanwhile our wise Englishman Lyndwood, and the noble and patient old Archbishop, are resolving the situation in their

[1] Wilkins, *Concilia*, iii. 471–86.

own way. Day by day, page by page, the 'Provinciale' is taking shape, in accordance with a far-seeing and foreseen design.

First, Lyndwood will dispose the Constitutions, modest in compass though they be, within a framework borrowed from the great Book of Decretals. Shrewd Professors, centuries hence, may sneer at the proceeding; but Lyndwood knows better. By adopting the framework of the Book of Decretals, he will be able, under the shelter of these humble Constitutions, to insinuate the whole substance of the decretals. His cunning task is to reset the jewel, not to chip or cleave or otherwise impair it.

Secondly, he will acknowledge, without shuffling or prevarication, the place which the Law of England has conquered for itself in regard especially to the Jus Patronatus. This stubborn outwork of the common law, with its frowning bulwarks in the laws of Provisors and Præmunire, he will not so much as think to assail. He knows as well as anybody that it is a rude invasion of the Roman Canon Law, or the Jus Commune, which you will; but there it is, there it means to stay; there, for the health and wealth of England and her Church, he is not sorry that it should stay; but he will do what he can to save the face of things by bringing it, if it may be, within the

good canonical principle of Custom. No need to say, what all the world knows, that the guardians of this pretty 'consuetudo Regni Angliæ' are the royal sheriffs and escheators. Enough for him to be able to go free beneath the embrasures of the Common Law.

Thirdly, he will have to deal with elements in the church law of England which are radically opposed to the prescription of the Jus Commune. Some are trivial, some of daily importance; to impugn them, for the sake of any abstract principle, would be to cause an instant commotion in his own court. They have, in fact, good ground in custom, which has, admittedly, the effect of law; their divergence from the Jus Commune may be pointed out; they must be treated, none the less, with scrupulous respect, and allowed for law within the English Provinces.

Lastly, there are certain Constitutions of the archbishops, more or less inoperative, which cannot plead good ground in custom, and which appear counter to prescriptions of law of higher authority, as proceeding from a 'superior' legislator, Pope or Legate *a latere*. As a good canonist he must hold them questionable, and, as an honest one, it will be his duty to say so; they are so far law that it will be unsafe to omit them; admitting them, it will be still more unsafe to call them 'void';

little as he personally may regard them, the fact of noting them as doubtful law and of affirming, in connection with them, the supreme legislative authority of the Pope, will enable him to assure his book, so new a departure in plan and execution, against any suspicion of heretical pravity, such as, in an atmosphere blended of hysteria and intrigue, might too easily attach to it. A light tone in dealing with them will entail no consequences; for the few Constitutions in question are now not much more than curiosities of law, the relics of abortive efforts at reform.

The above is offered as something like a true account of the principles which have gone to the making of the 'Provinciale.' Maitland tells us, on the other hand, that "what we find" in Lyndwood's book "is a stark papalism, which leaves little enough room for local custom, and absolutely no room for any liberties of the Anglican Church which can be upheld against the law-giving power of the pope" (pp. 47–8). Whereupon we say, first, that the Pope claiming to be above all law including his own, and the Church, unable as yet to behold her own origins except through a marsh-mist of forgeries, acknowledging that claim as of divine right, the only liberty of the Anglican, or any other, Church consisted in the freedom to accept

and profit by the protection of the Crown: which freedom, such as it was, was a matter of constant and daily exercise; secondly, that 'local custom,' or, to speak more adequately, authentic usages of national Church law,—such, for example, as the right of a beneficed clergyman to dispose of his goods acquired 'per ecclesiam' by will,—is not inconsiderable in extent, and is treated by Lyndwood with absolute respect notwithstanding its divergence from the Jus Commune; and thirdly, that the 'Provinciale' is so little informed by 'stark papalism' that its very design, to all appearance, is directed towards disabusing the author's countrymen, and especially the common lawyers, of any suspicion of the kind. After considering the 'Provinciale' "in quantum ingenii mei modulus comprehendere potuit," as its author would have said, I am bold to affirm that Lyndwood, a canonist writing on the Canon Law, could not have been less of a Papalist without being a heretic; and that he was as much of a Papalist and as little of a heretic as the ordinary Englishman of his day.

And now we reach the final step in the argument. Assuming that behind the 'Provinciale' there was such a design as we have endeavoured to show, we have to ask was that design fulfilled? Did Lyndwood achieve his

high purpose of at once preserving the Canon Law and disarming the common lawyers? That he did there can be little question. Lyndwood died in 1446. By his will he left his copy of the 'Provinciale' to be chained up in St. Stephen's Chapel, Westminster, the chapel of the Judges and the Houses of Parliament. It is not without significance that the following year, 1447, is almost[1] the last in which we hear of any protest in Convocation against the abusive issue of writs of præmunire in restraint of the courts Christian within the realm. In the succeeding half-century these writs, which had been a source of continual grievance and apprehension certainly for twenty, and pretty certainly for thirty years before, are hardly ever heard of. The Church courts are left to do their work in peace, under the ordinary and mild restraint of 'prohibition.'

There are other facts of a more vocal kind. We find that in 1462 the Constitutions of Canterbury are adopted as law by the Con-

[1] The matter appears again in Convocation in 1462, but apparently without special urgency. Shortly afterwards Archbishop Bourchier obtained from Edward IV. a promise by charter that in the case of suits concerning tithe the ecclesiastical jurisdiction should not be further molested by writs of prohibition and præmunire. Richard III. confirmed the charter. In the latter part of the century the clergy seem to have been concerned most anxiously with the efforts of the common law to bring felonious clerks in minor orders within its jurisdiction. These efforts achieved a measure of success in an early statute of Henry VIII. (4 Henry VIII. c. 2. Cf. Maitland, pp. 87–9).

vocation of York; which shows that, emerging from the obscurity and neglect of forty years before, they had already become the standard repertory of Canon Law within the southern Province itself.

Finally, we have the clinching witness of bibliography. The 'Provinciale,' from its appearance, was a living book. It was multiplied in manuscript, with and without its glosses; the manuscripts which survive are plainly books for use. Still more to the purpose, it was one of the earliest works of the kind to receive the honours of the printing-press. It was nobly printed in folio at Oxford within thirty years of Lyndwood's death. Beautiful little black-letter editions, without the gloss, were produced at Westminster by Wynken de Worde in the last decade of the fifteenth century. In the first decade of the sixteenth century (1506) a sumptuous edition of the entire work was printed at Paris to the order of a London publisher, William Bretton; it was dedicated to the reigning Archbishop, Warham; and the expert hand employed upon it was that of the famous canonist Jean Chappuis, the same who gave its final form to the collection of the Corpus Juris. We could desire no more sufficient proof that Lyndwood had not planned and worked in vain. The 'Provinciale' became a true Corpus

Juris Canonici Anglicanum, respectful of, greatly dependent on, but neither coincident with, nor closely fettered to, the 'canon law of Rome.' The latter, though promulgated in papal law-books, touched accordingly with a papal complexion, and including much that was purely and flagrantly papal, was still, in substance, the developing Jus Commune of the Church, the common heritage of every part. The elements in it most heavily weighted with Papalism were those most heavily discounted in England.

Indeed, it was an ill day for 'exuberant papalism' to any man of serious mind. Lyndwood was writing on the morrow of events which had set the whole Church system in England a-tremble, as a great ship trembles at the impact of some tremendous wave. For a longer time than men like Lyndwood cared to remember, its fate had been in dire suspense. The spiritual movement inspired by Wyclif had meant, upon its negative side, the renouncement of Papalism and all its works. It assailed the whole hierarchical principle. It challenged the prevailing notion of the Church as a hierarchy centred in, and governed from, Rome. It had appealed to the conscience of the individual, the layman, and to the forces of secular nationalism. Its fighting standard had been a Bible in the

mother tongue of England. In Lyndwood's day a feebly writhing carcase, it had threatened, in the days of its strength, to carry all before it. It had evoked a powerful response among the humbler clergy and among laymen of all ranks. That the established system managed to keep its foothold was due to a sudden turn of political fortune. It found shelter in a timely alliance with a new, unsteady dynasty, and security at last in the personality of a devoted prince. It was not Arundel but Agincourt that dealt Wycliffism its final blow. In the nick of time the Church found succour in the piety, the valour, the happy magnetism, the romantic Englishry of Henry v. After Agincourt Wycliffism as a force was dead. Englishmen rallied to the Church of King Henry as they rallied to the Church of Elizabeth after the Armada. Among Henry's 'band of brothers,' breathing his spirit, striving for a no less renowned victory of peace, the peace of the Church as they conceived it, were Chichele and William Lyndwood. Like Henry, they were devoted to the ideal of the sublime Vicariate, eager to restore the shattered credit of the Papacy; but too mindful, too sober of heart, to be 'exuberant,' too proud, too intelligent, too well aware of the signs of the times, to mortgage their Church to a decadent Papalism. They

were English Churchmen. A faithful member of the Christian commonwealth, their Church was to them Ecclesia Anglicana, the national Church. In the 'Provinciale' we have a conscious attempt to bring the current law of the Church into line with the buoyant spirit of nationalism. It was as much designed as an instrument of conservative reform as the Wycliffite Bible had been designed as an instrument of radical reform. It was no "elementary law-book for beginners," though Lyndwood, in his beautiful humility, did not forget them. It was a work, not only of learning, but of devotion, patriotism, and politic wisdom. It gave to the canonical discipline of the Church, threatened by the lawyers as her doctrine by the Lollards, a further tenure and lease of life. It set the courts Christian right with the Crown, Parliament, and the courts of common law; it ensured for them a full immunity in the coming crisis of the sixteenth century. Beneath the statutes of the Reformation Parliament, we feel, as below hatches, the 'Provinciale' working like ballast in a rolling ship. It is altogether remarkable, as we come to think of it, that the body of legislation under Henry VIII. which lopped the tentacles of the Roman Curia, at the same time extended to the Canon Law, including, within limits long

established and historic, the 'canon law of Rome,' what, with all its authority explicit or implicit, it had never yet possessed, a civil statutory sanction. Not only so, but more startling still, the effect of Henry VIII.'s Statute of Appeals was to extend to the courts Christian within the realm, in their specific character as courts of the realm, the protection of that very law of Præmunire which, directed originally against the Court of Rome in defence of the jurisdiction of the English Common Law, had been used by the common lawyers, in Lyndwood's day, as a menace to those same courts Christian. The old courts, the old law, the old lore that interpreted it, survived the stress of revolution. Lyndwood had builded better than he knew. He saw enough of troubled waters; yet he could scarcely have foreseen the tempests to come. When they came, the Canon Law, close-reefed and close-hauled in the 'Provinciale,' rode out their fury, with hardly a mast or spar dismantled, and only the papal pennant gone. Recommissioned, refitted by rough-and-ready shipwrights in the royal yards, the stout old vessel kept the seas, her timbers good for many a year to come. To this day, in spite of some odd rig and some unseamanlike handling, she still has water beneath her keel; she is not yet done with the making of history.

We cannot but think that the 'Provinciale' deserved worthier treatment than it has received at Professor Maitland's hands. His book is, undoubtedly, the work of a high-souled seeker after truth, in many fields an effectual seeker. But it is, as he himself affirmed, a trespass on alien ground; and it has not quite escaped the hazards of trespass. It seems seldom to penetrate beneath the bare surface of Lyndwood's text; it deals with Lyndwood as a mere lay figure. We find in him a living man at work upon materials. A closer scrutiny of these materials, and Lyndwood's handling of them, would have shown that there was an initial problem to be considered in Lyndwood himself. Had Maitland paused upon that initial problem, or even surmised its presence, he would have guarded against a mistake which has before spelt mischief to brilliant people who seek to subvert established notions, the mistake of citing a book as evidence before being at the pains to master its preface. He must have come to see in the 'Provinciale' something more than "an elementary law-book for beginners," executed upon lines of "stark papalism." The method he adopts is altogether too facile. He calls Lyndwood as a witness to the conditions of the time without ever suspecting that there may be need to

interrogate the conditions of the time before venturing to interpret Lyndwood.

A little less superficial in method, a little less supercilious in tone, his work might have been a weightier contribution to learning and thought. What, actually, has it achieved? It has drawn attention, with almost extravagant fullness and force, to the natural difference in point of view between a canonist of the fifteenth century and a body of Royal Commissioners in the nineteenth. How could there be other than difference after so much turbid water had flown beneath the bridges? When Stubbs states generally of 'the canon law of Rome' that "the texts were not authoritative," the statement is evidently true; and Lyndwood would have granted it, reluctantly perhaps, in the explicit sense in which it is meant. But when the Commissioners say, in a somewhat unsteady paraphrase of Stubbs, that Lyndwood's "extracts from and references to both the canon and civil law of Rome" "were not a part of the authoritative jurisprudence," Maitland does well to insist that in Lyndwood's own view they would have been "its supremely authoritative part"[1] But let us here hold fast to Stubbs. For him and for Lyndwood the facts are the same, though differently stressed in statement. To Lyndwood the papal law is

[1] Maitland, p. 47.

received as of course wherever it is not rejected, though he would have been careful not to use the word 'rejected.' To Stubbs it was rejected wherever it was not received, wherever it was opposed to the law of England, civil or ecclesiastical. And this difference of stress is not obscurely related to a broad difference in habit of thought as to the character of the Church. To the men of Lyndwood's day, the Church, as commonly conceived, was the hierarchy, the great ubiquitous corporation of ecclesiastics, of every grade from the lowest to the highest. Over this corporation the Pope presided as supreme lawgiver; his decretals, apart from authentic custom to the contrary, are the last word of law. And so Lyndwood, who represents the hierarchy, thinks and speaks. But the Church, in the only sense which it can bear to-day, its proper sense, as given by Lyndwood from the Decretum, of the 'multitudo fidelium,' was by no means the humble servant of the Popes. From the early fourteenth century onwards, papalism was no very sure passport to the hearts of Englishmen, laymen or at times even "men of Holy Church." If it found among the latter a theoretical or even practical subservience, it was met among the former with lively suspicion, with ill-concealed impatience, now and then with unconcealed hostility. To lay-

men, jealous of being masters in their own house, the Papacy was the head-centre of an elaborate and vexatious jurisdiction, the mainspring of "an insatiable jurisprudence,"[1] which made itself felt unduly in temporals and held and harassed them at countless points. Those 'ecclesiastical liberties' which were so sacred to the hierarchy, had come to mean simply the claim of the clergy to rule and mulct and discipline the laymen, while evading serious discipline themselves. So long as there was a fair understanding between prince and pope, the system held together, impregnable, inevitable; Englishmen grumbled at its mischiefs and abuses much as they now grumble at the weather, neither taking them too seriously nor seriously expecting any change. They tolerated the system, they were loyal to the ideal of it, they made the best of what it had of virtue; but it is greatly overbold to pretend that they loved it, as one popular modern writer has done. What they felt is properly to be gathered from what they did. They decided that in certain important matters at any rate, not the Roman pontiff but the English sheriff should have the power of the keys. By the Acts of Præmunire in the fourteenth century, by the common law writs of prohibi-

[1] Maitland, p. 57.

tion and præmunire before and afterwards, they made short work of much of the Roman Canon Law and took a short way with its more enterprising adherents. As we review these things: as we regard the Church and nation as a whole: as we measure its acts in Convocation and in Parliament: we are driven to conclude that the truth remains as the great Bishop taught it; that, as he said, "attempts to force on the Church and nation the complete canon law of the middle ages were always unsuccessful"; and that the English Church possessed, in her provincial legislation, a body of national Canon Law of substantive authority, and valid, on occasion, even as against the decretals.

And the 'Provinciale' means that, at a critical moment in her history, she felt it prudent, through so learned and loyal a son as Lyndwood, to make open proclamation of the fact.

VII. THE WILL OF WILLIAM LYNDWOOD, BISHOP OF ST. DAVID'S, 1442; DECEASED 1446

Lyndwood was a Lincolnshire man, born about the year 1375. He was educated at Gonville and Caius College, Cambridge, and graduated at Oxford as Doctor of Laws. After holding many lesser preferments, he became Archdeacon of Oxford in 1433, and of Stow in 1434. In 1414 he was appointed Official Principal to the Archbishop of Canterbury, becoming Dean of Arches in 1426. His youth and earlier manhood were contemporaneous with the Wycliffite ferment, and he had an important share in the measures for its repression. His 'Provinciale' was completed in 1433 after ten years of labour. In that year he was present at the Council of Basle as proctor for Henry VI., and published a formal protest against anything that might be done at the Council in derogation of the rights of the King of England. About the same time he was sworn of the Privy Council, and appointed keeper of the Privy Seal.

From 1417 to 1441 he was engaged in frequent diplomatic missions abroad; and at home was much concerned in the preliminary business connected with Henry VI.'s foundations of Eton and King's College, Cambridge. In 1442 he was consecrated Bishop of St. David's (October 21), dying, four years later, on the anniversary of his consecration.[1]

The following is a translation of Lyndwood's will, extracted from the MS. Register of Archbishop Stafford in the Lambeth Palace Library, under date 1446. It illustrates the foregoing argument; and it affords a welcome glimpse into the life and mind of a man who deserves to be a living figure in the memory of the Church.[2]

In the Name of God, Amen. I, William Lyndwode, by the grace of God bishop of St. David's, being sound in mind and body, on this the 22nd day of November, the Feast of St. Cecilia the Virgin, in the year of the Lord 1443, make my will in this manner:

First, I bequeath my soul to God and to the whole Court of Heaven, and my body to be buried in the Chapel of St. Stephen at West-

[1] *Dictionary of National Biography.*

[2] I have to thank the Rev. Claude Jenkins, Librarian of Lambeth Palace, for his most willing help, especially in the accurate transcription of this will.

minster, where I received the gift of consecration, in such place as may be agreed upon between the Dean and Canons of the said Chapel and the Executors of this my will. And I will that the place of my burial be fittingly adorned at least within a year after my death. Likewise I bequeath to the use of the said Chapel in memory of me my vestment woven of red satin and green velvet and the cope (capam) of the same suite. Also I bequeath to the said Chapel my vestment of black and green with the copes prepared for the same, and an altar cloth, that there they may serve in the Anniversaries of the departed. Also, on the occasion of my first exsequies there to be celebrated, I bequeath to the Dean of the said Chapel forty pence, and to any Canon then present two shillings. Also to any vicar of the same being present, twelve pence. Also to any clerk of the same then present six pence. Also to any chorister being present, four pence. And the like sums I bequeath to be paid to any of them being present on the thirtieth day of my obit, and similarly on my first Anniversary. Also I bequeath to be distributed among the poor assembling at the said times: at the first exsequies, twenty shillings; on the thirtieth day, to any such poor person, one penny; on the Anniversary, forty shillings. Also I will

that, in the matter of lights to be lit about my bier at any of the said exsequies, there be preserved an honest mean according to the quality of a Bishop; and that the poor men holding those lights be remunerated, that is to say, that each of them have six pence.

Also I bequeath to the church of Lyndewode, where I was born, my smaller Antiphoner of the three. Furthermore, wherever I shall be buried, I will that there, as speedily as may be, there be founded one perpetual chantry of two priests who shall celebrate for my soul and the souls of my parents and all my benefactors, if my property will suffice to perform it; otherwise, that provision be made for one chaplain, who shall receive at least ten marks a year for his salary.

Also I bequeath to my nephew William Annsell, my sister's son, one hundred pounds, or the value in things necessary to him. Also I bequeath to Robert Annsell, father of the said William, my gilt cup engraved with this word 'Osanna.'

Also I bequeath to the Library of the University of Oxford my 'Hostiensis' (sc. in Lectura ?) in two volumes, and my Psalter glossed in a fair hand. Also I bequeath to the Library of the University of Cambridge my 'Commentarius super Codicem,' and

the 'Bartholus' in paper 'super Digestum novum.'

Also I bequeath to be distributed to the poor nuns of those parts near which I shall be buried, ten pounds. Also I bequeath to be distributed among the mendicant friars of the same parts, ten pounds. Also I bequeath in like manner to be distributed among the poor of the hospitals, ten pounds. Also I bequeath for the repair of roads and bridges, ten pounds. Also I bequeath for a common distribution of alms to be made, ten pounds.

Also I bequeath to Master John Cantor the book called 'Willelmus in Speculum.' Also I bequeath to Adrian Grinbogh twenty pounds. Also to Richard Swanley ten marks. Also to John Wilde five marks. Also to William Kirkeby four marks. Also to John fforider five marks. Also to Lambert twenty-six shillings and eightpence. Also to John Ingram five marks. Also to each of the two boys now serving in the kitchen, twenty shillings. Also to William Prior five marks. Also to Richard ffornour twenty shillings. Also to any other gentleman or steward (domicello) in my household service for three years before, forty shillings. Also to any other valet (valetto) in my service for such a space before, twenty shillings. Also to any other boy in my service for so long a time before, ten shillings. Also

to any page five shillings. All and singular the premises to my household servants so bequeathed, I will to be so paid to them, if they be personally in my household service at the time of my death.

Also, if it happen that I am buried in St. Stephen's Chapel, Westminster, I will that of the monies due to me and which are due at the time of my death from my daily fees by reason of my office of Privy Seal,[1] there be expended by my executors for the completion of the cloister and bell-tower of the said Chapel,—provided that the sum may be had and obtained by them from the King's Highness,—six hundred marks. So, nevertheless, that the Dean of the said Chapel and Canons of the same bind themselves to perform annually in the same Chapel some spiritual office for my soul, as may be agreed upon between the Dean and Canons of the same Chapel and my executors.

Also I constitute as executors of this my will Master Robert Pyke, Master of Arts, Sir Thomas Hevy, chaplain, Master Ralph Dreff, Bachelor of Laws, Thomas Hethman, and the aforenamed Adrian Grinbogh, with the legacies as premised. Also with the aforesaid executors I appoint John Arden, Baron of the King's

[1] Lyndwood was sworn of the Privy Council and appointed Keeper of the Privy Seal in March 1432–33.

Exchequer, to the end that he, with the rest aforesaid, may see, consult and arrange for the completion of the aforesaid work; to whom I bequeath for his labour, ten pounds.

Also I bequeath to the Church of St. David's, if I shall be Bishop there at the time of my death, my two large Antiphoners; also my Legend written in two volumes. Also I bequeath to the parish church of Tryng my Legend in one volume.

The residue of all my goods not disposed of as above I bequeath to be disposed of by my aforesaid executors for pious uses, as shall seem to them the more expedient for the salvation of my soul. And I will that my silver vessels be turned into money in order to the fulfilment of my aforesaid will, if it shall be necessary. As concerning the better mitre and other my episcopal ornaments, with my other vestments and other things, I will that they be disposed of, at the discretion of my said executors, in recompense, if any need be, for charges of reparation falling upon me or them in connection with places and manors left by me in need of repair.

Also I will that my 'Corpus Juris Civilis' be repaired and rebound, and given as alms to some poor man well disposed to learning, that he may pray for my soul.

Also I will that my book which I have compiled on the Provincial Constitutions be laid up in chains and placed, so that it may be kept safe and secure, in the upper part of St. Stephen's Chapel aforesaid, or otherwise in the vestry of the same Chapel: in order that, as often as need be, recourse may be had to it for the truth of the original writing in the correction of other books to be copied from the same treatise. Also I will that a copy of the same book which, as is aforesaid, I compiled, and which, for the more part, Thomas Hethman wrote, remain in the possession of the same Thomas as his property; in order that, by letting out the copy of the same, he may be able to make some profit in recompense of his labour.

Also I will that my household servants be maintained in common at my charges for half a year after my death, so that in the meantime they may be able to provide for themselves in other situations.

As supervisor of this my will I appoint, make and constitute the Reverend Father in Christ, the lord William by grace Bishop of Lincoln; [1] and I bequeath to the same Reverend Father,

[1] The saintly William Alnwick, confessor to the young King Henry VI., and Bishop of Lincoln, 1436–39. Lyndwood, before his elevation to the Episcopate, had acted as one of Alnwick's commissaries in the business connected with the King's new foundations of Eton and King's College, Cambridge.

for his labour and diligence to be spent in that behalf, ten pounds.

In testimony whereof, I have set my seal to the disposition of this my will, on the day and year of the Lord abovesaid.

APPENDIX A

DOCUMENTS BEARING ON PECKHAM'S CONSTITUTION CONCERNING PLURALITIES

I. Decree of the Fourth Lateran Council (1215), Promulgated in the Decretal 'De multa by Innocent III.

"De multa providentia fuit in Lateranensi concilio prohibitum, ut nullus diversas Dignitates Ecclesiasticas et plures Ecclesias parochiales reciperet contra sacrorum Canonum instituta: alioquin recipiens sic acceptum amitteret, et largiendi potestate conferens privaretur. Quia vero propter praesumptiones et quorundam cupiditates nullus hactenus aut rarus de prædicto statuto fructus pervenit, Nos, evidentius et expressius occurrere cupientes, præsenti decreto statuimus, ut quicunque receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat, eo sit ipso jure privatus: et si forte illud retinere contenderit, etiam alio spolietur.

"Circa sublimes tamen et litteratas personas, quæ majoribus sunt beneficiis honorandæ, cum ratio postulaverit, per Sedem Apostolicam poterit dispensari."[1]

II. Othobon's Constitution 'Christianæ,' 1268[2]

"In posterum autem, cum ad Beneficium curam habens animarum quenquam præsentari aut ipsius

[1] C. 28, Extra, iii. 5, Corp. Jur. Can. Lugduni, 1618, ii. 1049. References throughout are to the text of this edition.

[2] John of Ayton, ed. 1679, p. 129.

collationem alias fieri contigerit, Statuimus ut Prælatus, qui circa id suum gerit officium, prius de vita et conversatione præsentati vel instituendi, ac de aliis quæ Jura præcipiunt inquisitione præmissa, hoc quoque diligenter discutiat et inquirat, utrum habeat præsentatus vel instituendus hujusmodi Personatus vel Beneficia alia curam animarum habentia, et si quidem habeat, an illa cum dispensatione an sine illa tenuerit ; quam si se habere asserit, illam intra terminum a Prælato statuendum post assertionem hujusmodi ipsi Prælato exhibere procuret, alioquin extunc nullatenus admittatur. Quod si institutus fuerit, nulla Institutio sit ipso Jure."

III. Decree of the Second Council of Lyons (1274), Promulgated by Pope Gregory X.

" Ordinarii locorum subditos suos plures Dignitates vel Ecclesias, quibus animarum cura imminet, obtinentes, seu personatum, aut dignitatem cum alio beneficio cui cura similis est annexa, districte compellant dispensationes, auctoritate quarum hujusmodi Ecclesias, personatus seu dignitates canonice tenere se asserunt, intra tempus pro facti qualitate ipsorum ordinariorum moderandum arbitrio, exhibere.

" Quod si forte, justo impedimento cessante, nullam dispensationem intra idem tempus contigerit exhiberi, Ecclesiæ, beneficia, personatus seu dignitates, quæ sine dispensatione aliqua eo ipso illicite detineri constabit, per eos, ad quos eorum collatio pertinet, libere personis idoneis conferantur." [1]

IV. Peckham's Constitution 'Audistis' in the Provincial Council at Reading, 1279

" Decernimus, juxta formam Generalis Concilii, omnia beneficia curam animarum habentia, quæ de

[1] C. 3, in Sexto, i. 16, Corp. Jur. Can. iii. 260–2.

facto obtinent hi qui dispensationem Apostolicam super pluralitate beneficiorum hujusmodi non habent, per beneficii receptionem quod ultimo receperunt, ipso Jure vacare. Et licet juxta rigorem Constitutionis Domini Othoboni sic recipiens plura beneficia ultimo ipso jure sit privatus (cum secundum eandem decernatur institutio irrita ipso jure): Præcavere tamen volentes ne rigorem videamur coacervare rigori, mentemque Constitutionum tam Concilii Generalis quam etiam Domini Othoboni clarius advertentes—quarum neutra et præobtentis et ultimo simul privat (cum Concilium Generale solum auferat præobtenta, ultimum tamen reservat; Constitutio vero (Wilkins, ii. 34, conciliumque) Othoboni institutionem in ultimo beneficio decernat (Wilkins, decrevit) irritam ipso jure, præobtento (Wilkins, præobtentis) tamen ipso jure (W. ipsum) non privat:—Nos, misericordiam cum rigore miscentes (W. add: non tam misericorditer quam etiam prudenter) permittimus, ut is qui plura beneficia curam animarum habentia absque (W. sine) dispensatione Apostolica fuerit assecutus, ultimo beneficio sic obtento, juxta Generalis Concilii tenorem, sit contentus (W. ultimum sic obtentum retineat, et eodem juxta concilii generalis tenorem de nostra speciali gratia sit contentus); nisi forte (W. forsan) ex temeritate contenderit etiam præobtentum (W. præobtenta) improbe retinere; in quo casu ipsum nec primo nec ultimo dignum, immo nec medio nec aliquo (W. nec medio immo nec aliquo) judicamus, sed ea potius ipso jure vacare (W. sed potius ea omnia de jure vacare); quibus omnibus, quatenus de facto eadem detinet occupata, censemus perpetuo spoliandum."

"Decernimus etiam, et perpetua stabilitate firmamus, ut quicunque in posterum plura beneficia curam animarum habentia seu alias incompatibilia absque Sedis Apostolicæ dispensatione receperit vel

assecutus fuerit per modum Institutionis, vel Commendæ, seu Custodiæ, vel unum titulo Institutionis, aliud titulo Commendæ vel Custodiæ, præter modum illum quem Constitutio Gregoriana edita in Concilio Lugdunensi permittit, eo ipso sit privatus omnibus sic obtentis beneficiis, ipsoque facto sententia Excommunicationis permaneat innodatus: a quo non nisi per Nos aut successores nostros vel Sedem Apostolicam absolutionis gratiam valeat promereri." [1]

V. Peckham's Letter to Pope Nicholas III. (see p. 135–7), 1280

" Sanctissimo patri ac domino Nicolao, Dei gratia sacrosanctæ Romanæ ac universalis ecclesiæ summo pontifici, frater Johannes, permissione divina sacerdos ecclesiæ Cantuariensis, cum filiali reverentia pedum oscula beatorum.

" Præclaræ considerationis vestræ, pater sanctissime, oculus non ignorat, qualiter sancta informatione vestra edoctus processerim ad extirpandam effrænatam quorundam, quin potius multorum, audaciam spreta apostolica dispensatione occupantium beneficia plurima curam habentia animarum. Quæ pestis eo erat insanabilior quo in multos serpendo processerat, et dum rarus vel nullus hoc malum superior arguebat, rejectis circa hoc statutis concilii Lugdunensis, licitum simpliciter putabatur. Nec erat facile homines generosos affluentes et honoribus assuetos subito ad pauperiem deprimere verecundam. Dum igitur, junctis severitate et clementia deliberarem circa hoc perficere vestræ immo et divinæ beneplacitum voluntatis, consolatus est me plurimum dominus Antonius dictus Bek, fidelissimus regis Angliæ secretarius, qui tertia die mensis Augusti statum suum, quantum ad beneficia curam animarum

[1] Lyndwood, 135–7; cf. Wilkins, *Concilia*, ii. 34.

habentia meæ sufficienti procuratorio in Cantuariensi provincia subdidit voluntati. Quorum dum numerum inquirerem, intellexi per ejusdem procuratorem ipsum tantum quinque beneficia cum cura in Cantuariensi provincia obtinere. Quorum unum, ad patronatum cujusdam prioratus pertinens, illico conferendum decrevi. Tria vero residua patronos laicos habentia, sed et quartum, de quo est contentio inter patronum clericum et laicum, adhuc in ipsius reliqui manibus, donec vestro edocear oraculo quid agendum; quia publice mihi asseritur clementiam vestram disponere, tam ipsi quam ceteris clericis quibusdam regalibus, dispensationis gratiam impertiri. Quocirca vestræ supplico pietati, cujus memoria ærumnam meam pluries consolatur, quatenus circa hoc suspensionem animi mei dignemini sublevare, scientes quod cum modico adjutorio clementiæ vestræ propositum assequar circa talia, favente Domino, quod nullius rigoris conatibus assecutus fuissem, vel assequerer in futuro. Hoc nihilominus dominationi vestræ certa sponsione affirmans, quod nullum sine dispensatione apostolica plura cum cura animarum beneficia obtinentem, nisi hoc purgato vitio, recepi ad episcopalis honoris gratiam vel recipiam in futuro.

"Conservet Dominus sanctam sublimitatem vestram ecclesiæ suæ sanctæ per tempora longiora," etc.[1]

[1] Peckham, *Registrum*, i. 137–8.

APPENDIX B

MAITLAND'S INFLUENCE IN RECENT TEACHING

"MAITLAND'S *Lectures on Canon Law* are perhaps the book one could best recommend to the average reader. He has to meet the extraordinary theory of the Ecclesiastical Courts Commission dictated by Stubbs, and signed by twenty-three distinguished names, that Canon Law had 'no binding force' on the English Church till ratified by that Church. How crushingly, and all the more because so courteously, he meets it, (1) by the express counter-declaration of Lyndwood, the chief authority in England in the fifteenth century; (2) by Peckham's own statement in 1292 that all men are bound by the Pope's decrees; (3) by the fact that England added nothing worth counting to Canon Law. Finally, reluctant as he would be to expose divers reverend, noble, and learned commissioners to playing the chief rôle in an *auto-da-fé*, he invites us to see what short work a Church court would have made of any who talk of Canon Law of the Church of Rome as if that was not the whole Church, and how for those who hint that the English Church was not bound by papal statutes, 'the archbishop may feel it his painful duty to relinquish you to the lay arm, and you know what follows relinquishment to the lay arm.' In Lecture II. he proves that the claim of independence of the English Church from Rome has been confused with the practice of the English State

to seize part of the Church's field of jurisdiction, and that the barons' 'Nolumus leges Angliæ mutare' has been misread to mean a rejection of Canon Law by the English Church, whereas the bishops had just said 'Nolumus legi ecclesiæ non obedire.' So the State took the question of legitimacy away from the Church courts, and sent it before a lay jury. 'Between Church and State the honours were divided, but the State took the odd trick.' Then in the rest of the lecture he goes on to treat this one controversial point in such a way as not merely to elevate controversy into dispassionateness, but he also uses it as the thread on which to build up a review of relations of Church and State and Papacy, which is so masterly that beside it Stubbs' chapter on the same subject at the close of his great *Constitutional History*—— Will you excuse me for not completing the sentence ? for here in Oxford, whose School of History owes so much to Stubbs, it would be like speaking disrespectfully of the equator.

"You will perhaps listen to Dr. Rashdall where you would not to me, when he says that the history of the mediæval Church in England requires to be rewritten in this new light." [1]

As an example of the infiltration of Maitland's doctrine into more popular teaching, we have the following :—

"There is no sign of our ecclesiastics evolving a spiritual jurisprudence representing the *national* Church. The relation of provincial Constitutions to papal decretals was thus, it seems, somewhat like that of our County Council bye-laws to Acts of Parliament. 'The Archbishop' says Dr. Maitland, 'may make for his Province Statutes which are merely declaratory of the *jus commune* of the Church, Statutes which amplify it and give it a sharper edge.

[1] *Frederic William Maitland: two Lectures and a Bibliography.* By A. L. Smith, Balliol College, Oxford, pp. 47–9.

He may supplement the papal legislation, but he has no power to derogate from, to say nothing of abrogating, the laws made by his superior.' This applies, too, according to Lyndwood, not only to papal decretals, but to the Constitutions of the legates *a latere* sent to England. Despite the legatine prerogatives of our primates, no English prelate, no English council, has any power, *e.g.*, to repeal or override the Constitutions of Otto or Ottobon, or even to put a statutory interpretation on them in any case of ambiguity (cf. Lyndwood, ed. 1679, pp. 154, 160, 246). Lyndwood was, of course, an extreme papalist, but on the point of our subservience to Rome Ayton gives precisely the same testimony, and there is, according to Dr. Maitland, absolutely no evidence existent of contrary opinion." [1]

In *The Laws of England*, edited by Lord Halsbury (vol. xi. p. 377), there is an apparent endeavour to adopt both sides of the argument. We are told that—

" The Canon Law of Europe does not and never did as a body of laws form part of the law of England."

This is substantially the position of Stubbs and the Ecclesiastical Courts Commission. But further we read—

" In pre-Reformation times no dignitary of the Church, no archbishop or bishop, could repeal or vary the Papal decrees." And to this there is a footnote as follows :—

" ' Tollere vel alterare non potest episcopus nec aliquis papa inferior' (Lyndwood). Much of the canon law set forth in archiepiscopal constitutions is merely a repetition of the Papal canons, and passed for the purpose of making them better known in remote localities ; part is *ultra vires*, and the rest consisted of local regulations, which are only valid

[1] A. C. Jennings, *The Mediæval Church and the Papacy*, pp. 260–1, in ' Handbooks of English Church History,' ed. J. H. Burn, 1909.

in so far as they do not contravene the 'jus commune.'"

This is a somewhat bald rendering of Maitland. As an estimate of their powers or acts, it would not, we hold, have been recognised by the mediæval Primates.

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